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CHORLEY & TUCKER'S LEADING CASES ON MERCANTILE LAW

BEING A COMPANION VOLUME
TO
STEVENS' MERCANTILE LAW

THIRD EDITION
BY
LORD CHORLEY, M.A.
OF THE INNER TEMPLE, BARRISTER-AT-LAW,
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PREFACE TO THIRD EDITION

In preparing the third edition of this book we have not found it necessary to make such extensive alterations as seemed advisable with the second edition. We have, however, taken the opportunity to add three new cases, in order to illustrate important rules of law not previously dealt with and to omit one or two of declining interest. In a few cases we have substantially reorganised the material, and in others, notably impossibility of performance, important changes in the law have necessitated a good deal of rewriting. In a number of cases the notes have been expanded or revised.

Dr. O. C. Giles, who assisted with the preparation of the second edition, has now become joint editor.

We have again to acknowledge with appreciation the permission of the Incorporated Society of Law Reporting to make use of the *Law Reports*.

CHORLEY.
O. C. GILES.

May 1948

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CASES ON MERCANTILE LAW

NATURE OF CONTRACT

ROSE AND FRANK CO. v. J. R. CROMPTON AND BROS., LTD.,

[1925] A. C. 445

An agreement must be intended to have legal consequences in order to constitute a binding contract.

Facts of the Case

Rose and Frank Company were dealers in tissues for carbonising papers in New York. The two companies, Crompton and Brothers Ltd. and Brittains Ltd., were manufacturers of such tissues in England. In July, 1913, an arrangement was entered into by a memorandum in writing made between R. & F. Co. and the two English companies whereby the latter agreed to give R. & F. Co. certain rights of selling their carbonising tissues in U.S. and Canada, such arrangement to last for three years, with a right to extend it, but subject to six months' notice to terminate it. It was subsequently extended to March, 1920. The memorandum recording the arrangement contained the following clause :—

“ This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the Law Courts, either of the U.S. or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they each honourably pledge themselves, with the fullest confidence—based on past business with each other—that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation. This is hereinafter referred to as the ‘ Honourable Pledge Clause.’ ”

In 1919, while the arrangement was still in force, differences arose between the parties, and the two English companies terminated the arrangement in May, 1919, without giving the appropriate notice, and they also refused to execute certain specific

orders for tissues which had been received and accepted by them from R. & F. Co.

R. & F. Co. claimed damages from the two English companies, C. & B. Ltd. and B. Ltd., for breach of the arrangement, and also for non-delivery of the goods comprised in the specific orders accepted by C. & B. Ltd. and B. Ltd.

Decision

It was held by the **House of Lords** that, in view of the "Honourable Pledge Clause" set out above, the arrangement so made in 1913, and subsequently continued by the parties, was not a binding contract, and therefore R. & F. Co. were not entitled to recover damages in respect of the termination of the arrangement in May, 1919, but that as regards the specific orders already accepted by C. & B. Ltd. and B. Ltd. from R. & F. Co. prior to the termination of the arrangement, those orders, by virtue of the acceptances, had become binding contracts to the extent of the goods comprised in the same.

In the course of his speech in the **House of Lords**, dealing with the main point as to whether the arrangement constituted a binding contract or not, Lord PHILLIMORE said :—

"Here, I think, the overriding clause in the document is that which provides that it is to be a contract of honour only and unenforceable at law."

In his judgment in the **Court of Appeal** (see [1923] 2 K. B., p. 288), SCRUTTON, L.J., said :—

"It is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement does not give rise to legal relations. The reason of this is that the parties do not intend that their agreement shall give rise to legal relations. This intention may be implied from the subject-matter of the agreement, but it may also be expressed by the parties. In social and family relations such an intention is readily implied, while in business matters the opposite result would ordinarily follow. But I can see no reason why, even in business matters, the parties should not intend to rely on each other's good faith and honour, and to exclude all idea of settling disputes by any outside intervention, with the accompanying necessity of expressing themselves so precisely that outsiders may have no difficulty in understanding what they mean."

NOTES

This case emphasises previous decisions that agreements not intended by the parties to have binding force cannot be treated as actual contracts. Most of such agreements relate to social and family matters. In

Balfour v. Balfour, [1919] 2 K. B. 571, for instance, the Court of Appeal held that an arrangement between husband and wife that the husband would allow his wife £30 a month, if she would support herself without calling on him for further maintenance, did not constitute a binding contract, but was an ordinary domestic arrangement not enforceable in a court of law. In that case ATKIN, L.J., said:—

“ It constantly happens, I think, that such arrangements made between husband and wife are arrangements which are mutual promises, or in which there is consideration in form within the definitions which I have mentioned. Nevertheless they are not contracts, and they are not contracts because the parties did not intend that they should be attended by legal consequences.”

It will be observed that in the case of an agreement of a kind which normally gives rise to legal obligations (such as an agreement concerned with business transactions) it will only be excluded from the jurisdiction of the Courts if there is some express clause so providing or negativing the binding character of the agreement; whereas an agreement of a kind which does not usually lead to legal obligations (such as one dealing solely with social or domestic affairs) will be outside the jurisdiction of the Courts unless there is an express provision to the contrary.

See also *Jones v. Vernon's Pools, Ltd.*, [1938] 2 All E.R. 626, where there was a clause on football pool tickets that no legal relations should arise between the parties, but that any transactions were to be binding in honour only. The plaintiff alleged that he had posted a ticket to the defendants, and the latter denied its receipt. It was held that the clause on the ticket was a bar to any action in a Court of Law. See Stevens' Elements of Mercantile Law, 10th Edn., p. 1.

STATUTE OF FRAUDS, 1677, AND SALE OF GOODS ACT, 1893

PEARCE v. GARDNER,

[1897] 1 Q. B. 688

A note or memorandum in writing under the Statute of Frauds, 1677, or the Sale of Goods Act, 1893, need not be contained in one document, and oral evidence may be given to show that two or more documents together form one memorandum.

Facts of the Case

The defendant agreed to sell some gravel to the plaintiff who in turn agreed to dig and carry it away. This action was

brought by the plaintiff against the defendant for breach of the agreement to sell the gravel. The defendant contended that it was an agreement concerning an interest in land within the terms of section 4 of the Statute of Frauds, 1677, or alternatively that it was an agreement for the sale of goods of the value of £10 or upwards within section 4 of the Sale of Goods Act, 1893, and that in either event a written memorandum signed by the defendant or his agent, and containing the terms of the contract and the names of the parties, was required, and that no such memorandum existed here. The plaintiff produced a letter signed by the defendant, which was addressed "Dear Sir," but did not contain the name of the plaintiff. The plaintiff also gave evidence that he received the letter through the post in an envelope addressed to himself, and he contended that that letter, and the envelope, together formed a sufficient memorandum to satisfy both the Statute of Frauds and the Sale of Goods Act.

Decision

It was held that this contention was right and that the oral evidence of the plaintiff was admissible to connect the letter and envelope together.

In the course of his judgment in the **Court of Appeal**, LOPES, L.J., said :—

" This action is brought to recover damages for breach of a contract which requires a memorandum in writing either under section 4 of the Statute of Frauds, or under section 4 of the Sale of Goods Act, 1893. Such a memorandum must show what is the contract and who are the contracting parties, though it need only be signed by the party to be charged. In the present case everything required appears in a letter signed by the defendant with the exception of the name of the plaintiff as the other contracting party. That defect it is attempted to remove by means of the address on an envelope. The evidence on this point is that the letter reached the plaintiff by post in an envelope fastened and directed to him. In my opinion that state of facts is sufficient to meet the objection. The envelope was a necessary concomitant of the letter, which without it would not have reached its destination, and I think they must be taken together as one document."

NOTES

This principle was also applied in the case of *Stokes v. Whicher* [1920] 1 Ch. 411, where verbal evidence was admitted to connect an original document signed by one party and a carbon copy signed by the other party's agent.

Oral evidence will be admitted in such a case to connect two docu-

ments together where each one obviously or inferentially refers to the other (as in the case of the letter and its envelope) or where each document refers to the same parol contract, and where in either case the two documents when taken together contain all the terms of the contract.

Where the two documents do not so refer to each other or to the same contract (either expressly or by inference), but nevertheless when placed side by side they do form a complete contract, it has been suggested that then also oral evidence is admissible to connect them together, but this is not quite certain. See per RUSSELL, J., in *Stokes v. Whicher*, [1920] 1 Ch. 411, at p. 419. And see also per KEKEWICH, J., in *Oliver v. Hunting* (1890) 44 Ch. D. 205, at p. 209, and also the case of *Sheers and Serjeant v. Thimbleby & Son* (1897), 13 T. L. R. 451.

The converse position arose :—

Smith v. MacGowan [1938] 3 All E. R. 447, where, at an auction sale, the defendant's solicitors, acting on the instructions of the defendant, bid for and purchased three distinct lots of freehold property. A separate memorandum in writing was not made for each lot, but the solicitors signed one memorandum as agents for the defendant in respect of the three lots, and by such memorandum the defendant, by his agents, agreed to purchase the three lots for £775, which was the aggregate price of the three lots. In fact the solicitors had no authority to combine the three purchases into one. The vendor sued the defendant for specific performance of this agreement to purchase the three lots, but it was held, that as there were in fact three separate agreements to purchase the three lots, and the solicitors had no authority to deal with them in one agreement, the memorandum signed by them was not a sufficient memorandum of any of the three agreements and did not satisfy the requirements of section 40 of the Law of Property Act, 1925—which has replaced the Statute of Frauds as regards contracts for the sale of land. See Stevens' Elements of Mercantile Law, 10th Edn., p. 7.

MORRIS v. BARON & CO.,

[1918] A. C. 1

A contract required to be evidenced in writing by s. 4 of the Statute of Frauds, 1677, or s. 4 of the Sale of Goods Act, 1893, may be rescinded by oral agreement, but cannot be varied in the same way.

Facts of the Case

In September, 1914, Morris contracted to sell to Baron & Co. 500 pieces of cloth at prices and on terms set out in a written memorandum signed by both parties. The contract came within the provisions of section 4 of the Sale of Goods Act, 1893, and the requirements of that section were complied with by the memo-

randum in writing. In March, 1915, Morris sued Baron & Co. to recover £888 4s., the price of the goods then supplied by him, and Baron & Co. counterclaimed against Morris £934 17s. 3d. as damages for non-delivery of some of the goods comprised in the memorandum. Before the action came on for trial the parties made verbal arrangements, which were later expressed in a letter written by Baron & Co. to Morris in April, 1915, as follows :—

“ Dear Sirs,

“ As personally arranged between Mr. Morris and Mr. Baron, we herewith confirm the terms agreed upon.

“ Both to withdraw the legal proceedings and instruct the solicitors accordingly, and each to pay his own costs, you to allow £30 (thirty pounds) to us to meet expenses incurred through not fulfilling the orders.

“ The account to be left over for three months so as to give us the opportunity of selling the goods, and the goods not delivered to be kept for us if we ask for them.

“ We have the option of taking up the balance of pieces to complete the order, giving time to make.

“ Yours faithfully,
BARON & Co.”

There was no written memorandum signed by M. confirming these terms.

In February, 1916, Morris again sued Baron & Co. to recover the £888 4s. which was still unpaid. Baron & Co. did not contest this claim, but again counterclaimed for damages for non-delivery of some of the goods, and they based this counterclaim first on the arrangement made in April, 1915, as above, and alternatively on the original contract of September, 1914.

Decision

It was held by the **House of Lords** that Baron & Co.’s counter-claim failed. The House of Lords decided that the arrangement of April, 1915, was made by the parties with the intention of terminating the original contract of September, 1914, and was not, therefore, a contract for the sale of goods, and that it operated to rescind the original contract, notwithstanding the fact that the arrangement of April, 1915, was made orally. In so far as such arrangement was intended to operate as a new agreement it was unenforceable, because there was no note or memorandum of it in writing signed by the party to be charged (*i.e.* Morris) or his agent, but in so far as it was intended to rescind the contract of September, 1914, it was effective.

Morris v. Baron & Co.

In the **House of Lords** Lord HALDANE said :—

“ Accordingly while a parol variation of a contract required to be in writing cannot be given in evidence, the very authorities which lay down this principle also lay down not less clearly that parol evidence is admissible to prove a total abandonment or rescission. Now there is no reason why this should not be done through the instrumentality of a new agreement which does not comply with the statutory formalities, just as readily as by any other mode of mutual assent by parol. What is, of course, essential is that there should have been made manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which still leave it subsisting.”

NOTES

When giving their decision the House of Lords explained and distinguished the earlier case of *Noble v. Ward* (1867), L. R. 2 Ex. 135, where a written contract was made for the sale of goods exceeding £10 in value, and, before the stipulated time for delivery, the parties made an oral agreement extending that time. It was held that such oral agreement did not effect a rescission of the former contract, but was merely a variation of it, and therefore that an action would lie for breach of the original contract, the oral variation being ineffective because not evidenced by writing.

The case of *Noble v. Ward* should also be compared with that of *Besseler Waechter Glover & Co. v. South Derwent Coal Co., Ltd.*, [1938] 1 K. B. 408, where it was held (applying the judgment of Lord ATKINSON in the above case of *Morris v. Baron & Co.*) that in the case of a contract in writing for the sale of goods exceeding £10 in value, which provided for deliveries to be made at or between certain stated times, where, it was later agreed verbally between the parties that the time for delivery should not be insisted upon, or should be extended, the original contract in writing was not affected, and the parties were still bound to deliver and accept the full quantity of goods comprised in the contract, although the original time for delivery had expired and notwithstanding that the extension of time was not agreed in writing. See also *Ogle v. Earl Vane* (1868), L. R. 3 Q. B. 272; and *Levey & Co. v. Goldberg* [1922] 1 K. B. 688.

As to variation of the terms of an existing contract, the case of *Berry v. Berry*, [1929] 2 K. B. 316 should also be noted. In that case a husband and wife entered into a Deed of Separation in 1920, whereby the husband covenanted to pay a monetary allowance to the wife. By an agreement in writing, but not under seal, made in 1928, the parties agreed that the terms of the Separation Deed relating to that allowance should be varied in certain respects. In 1929 the wife brought an action claiming the difference for the previous six months between the

instalments provided for and received by her under the written agreement of 1928, and the instalments provided by the original deed of 1920. It was held by the Divisional Court that it would be inequitable to allow the wife to enforce the original deed after entering into and acting under the later written agreement, although the latter was not under seal, that the rules of equity must prevail, and therefore that the husband's plea of the simple contract of 1928 was a good defence to the wife's claim based upon the original deed of 1920.

The principle laid down in the case of *Morris v. Baron & Co.* will not apply unless the Court is of opinion that the parties, when making their subsequent arrangement, really did intend to rescind the former contract. If there is no evidence of an intention to terminate the former contract, then it will stand, and the subsequent oral arrangement will be inoperative, since it cannot take effect as a variation of the former contract, because evidence is not admissible to prove an oral variation of a written contract. See *British and Beningtons, Ltd. v. North Western Cachar Tea Co., Ltd.*, [1923] A. C. 48.

There may however be an implied abandonment of a written contract to be inferred from the conduct of the parties. See *Pearl Mill Co., Ltd. v. Ivy Tannery Co., Ltd.*, [1919] 1 K. B. 78. See Stevens' Elements of Mercantile Law, 10th Edn., p. 10.

McGREGOR v. McGREGOR

(1888), 21 Q. B. D. 424

Contracts not to be performed within a year from the making thereof must be evidenced by writing.

Facts of the Case

A husband and wife made an oral agreement under which they were to live separate and apart from each other, and the husband agreed to allow his wife £1 a week for maintenance, and she agreed to maintain herself and the children and to indemnify her husband against any debts contracted by her. They duly separated in pursuance of the agreement. Later on, the husband got behind with the maintenance, and the wife sued him for the arrears. One point taken by him in defence was that the agreement was an agreement not to be performed within one year, under section 4 of the Statute of Frauds, 1677, and was therefore unenforceable, as there was no memorandum in writing to satisfy that Statute.

Decision

It was held that it was not an agreement not to be performed within a year, and was enforceable although made orally.

In his judgment in the **Court of Appeal**, Lord ESHER said :—

"I think the true doctrine on the subject is that which was laid down by TINDAL, C.J., in *Souch v. Strawbridge* (1846), 2 C. B. 808, where he said: 'It (the Statute) speaks of any agreement that is not to be performed within the space of one year from the making thereof, pointing to contracts the complete performance of which is of necessity extended beyond the space of a year. That appears clearly from the case of *Boydell v. Drummond* (1809), 11 East. 142, the rule to be extracted from which is, that where the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the Statute; but that where the contract is such that the whole may be performed within a year, and there is no express stipulation to the contrary, the Statute does not apply.'"

And LINDLEY, L.J., said:—

"The provisions of the Statute have been construed in a series of cases from which we cannot depart. The effect of these decisions is that if the contract can by possibility be performed within the year, the Statute does not apply."

NOTES

It has been decided that where it is the intention of the parties that a contract should be performed on one side within a year from the date it is made, and it is capable of being so performed, then the contract does not come within the Statute of Frauds, although the obligations of the other party to the contract may and are intended to continue well beyond the year. See *Donellan v. Read* (1832), 3 B. & Ad. 899; *Smith v. Neale* (1857), 2 C. B. (N. S.) 67.

But where a contract is entered into for a definite period exceeding one year, then it does come within the Statute of Frauds, even though there may be a term giving power to either party to determine the contract by notice within a year—see *Hanau v. Ehrlich*, [1912] A. C. 39. In that case it was found that there was an agreement for the employment of the plaintiff by the defendant for a period of two years, subject to six months notice on either side during that period, but there was no sufficient memorandum in writing of the agreement. It was held that such agreement came within the Statute of Frauds and accordingly that the plaintiff's action for damages for breach of contract failed. See also *Reeve v. Jennings*, [1910] 2 K. B. 522.

On the other hand in the above case of *McGregor v. McGregor* no definite time was fixed for the duration of the contract, and it might have come to an end at any moment within a year by the parties resuming cohabitation, or in some other way.

In *Adams v. Union Cinemas, Ltd.*, [1939] 1 All E. R. 169, an informal discussion took place between the plaintiff and the defendant's director, and the latter offered the former a position as controller of Cinemas. In reply to a question, for how long he should make arrangements, the

director replied : for two years, but "you will see how you get on with the work." Three days later the plaintiff entered on his duties. When he was dismissed after a few months, the defendants relied on the Statute in answer to a claim for damages. It was held, however, that no memorandum was necessary. No contract was made at the informal meeting, but only an offer. This the plaintiff accepted by starting on his duties, but at that time nothing was said about the two years. It was therefore a contract for an uncertain duration, which could be completed within one year, and the Statute did not apply.

See Stevens' *Elements of Mercantile Law*, 10th Edn., p. 11.

PRESTED MINERS CO., LTD. v. GARNER, LTD.,
[1910] 2 K. B. 776; *affirmed*, [1911] 1 K. B. 425

Where a contract comes within s. 4 of the Statute of Frauds, 1677, and also within s. 4 of the Sale of Goods Act, 1893, the provisions of both Statutes must be complied with.

Facts of the Case

An interview took place between representatives of the plaintiff and defendant companies at which terms of a proposed agreement were discussed—the defendants to appoint the plaintiffs sole agents for the sale of a particular make of carburettor in consideration of the plaintiffs ordering a minimum of 500 carburettors during the first year, and the same each year afterwards ; and if the plaintiffs duly ordered such minimum number in any one year they were to be at liberty to continue the agreement for a further year on giving notice.

No written agreement was signed. Differences arose, and the plaintiffs sued the defendants upon the alleged agreement. The defendants contended that the agreement was one which was not to be performed within the space of one year from the making thereof and was therefore unenforceable under section 4 of the Statute of Frauds because there was no note or memorandum of the contract in writing signed by the defendants or their agent.

The question for decision was whether, if section 4 of the Sale of Goods Act, 1893, had been satisfied by the acceptance and receipt by the plaintiffs of part of the goods concerned, the contract might still be unenforceable under section 4 of the Statute of Frauds, because not in writing and signed by or on behalf of the defendants.

Decision

It was held by WALTON, J., that a contract which came within the provisions of both Statutes must comply with the requirements of both of them, and that as there was no note or memorandum in writing of this contract signed by the defendants or their agent, the contract was unenforceable, even though the provisions of the Sale of Goods Act had been satisfied in another way.

In his judgment, WALTON, J., said :—

“ On behalf of the plaintiffs it was contended . . . that if a contract for the sale of goods is brought within section 4 of the Sale of Goods Act, 1893 . . . it is not within section 4 of the Statute of Frauds. It was assumed . . . that the agreement upon which this action was brought was an agreement which was not to be performed within the space of one year within the meaning of section 4 of the Statute of Frauds. Although the agreement comprised other matters, it was essentially an agreement for the sale of goods upon certain terms and conditions. The question for my decision is whether section 4 of the Statute of Frauds applies to an agreement for the sale of goods . . . it appears that it has always been assumed that an agreement for the sale of goods may be within section 4 of the Statute of Frauds, and I so hold. In my judgment this agreement is within section 4 of the Statute of Frauds, and that section, notwithstanding anything in the Sale of Goods Act, 1893, governs this case. On that ground, and on that ground only, I hold that this action cannot succeed.”

NOTES

This case was taken to the Court of Appeal by the plaintiffs, but in that Court they gave up the contention that section 4 of the Statute of Frauds did not apply to the contract, and argued that it was not an agreement which was not to be performed within a year. The Court of Appeal decided that it was, and dismissed the appeal. See Stevens' Elements of Mercantile Law, 10th Edn., p. 11.

OFFER AND ACCEPTANCE

CARLILL v. CARBOLIC SMOKE BALL CO.,
[1893] 1 Q. B. 256

(i) *An offer need not be made to any particular individual but may be made to the world at large, provided it can be accepted by a definite person.*

(ii) *Although as a rule notice of the acceptance of an offer must be given to the person making the offer, that does not apply where he shows by his offer that he does not expect to receive notice of acceptance apart from notice of performance.*

Facts of the Case

In 1891 there was an epidemic of influenza and the defendants were selling a medical preparation known as "the Carbolic Smoke Ball" to be used as a preventative remedy. They issued an advertisement in which they offered to pay the sum of £100 to any person who contracted influenza after using the Smoke Ball three times a day for two weeks, in accordance with the directions, and they announced that they had deposited £1,000 with a certain bank to show their sincerity in the matter. The plaintiff (Mrs. Carlill) purchased one of the Smoke Balls from a chemist's shop and used it in accordance with the directions, but she still caught influenza. She then sued the defendants to recover the sum of £100 in accordance with the advertisement. They contended (among other things) that the advertisement did not amount to an offer, that there was no consideration, and further that the offer (if any) contained in the advertisement was not binding because it was not made to any one person in particular, and that they were not liable to the plaintiff because she had not intimated to them that she intended to accept the offer.

Decision

It was decided by the **Court of Appeal**, that the advertisement was an offer, and that there was consideration, and further :—

- (1) That an offer need not be made to any one in particular, and that in this instance it was made to the whole of the public, and that the plaintiff, being a member of the public, was entitled to accept it, provided she complied with the terms of the advertisement.
- (2) That notice of the acceptance of the offer was not required in this case, as the defendants showed by the terms and the nature of their offer that they did not require notice of the acceptance of the offer apart from notice of the performance of the conditions contained in the offer.

In the **Court of Appeal**, dealing with the first of these two points, BOWEN, L.J., said :—

" It was also said that the contract was made with all the world—that is, with everybody, and that you cannot contract with every-

body. It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world, and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to anyone who, before it is retracted, performs the conditions, and although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement."

Dealing with the second point LINDLEY, L.J., said:—

"But then it is said, supposing that the performance of the condition is an acceptance of the offer, that acceptance ought to have been notified. Unquestionably, as a general proposition, when an offer is made, it is necessary, in order to make a binding contract, not only that it should be accepted but that the acceptance should be notified. But is that so in cases of this kind? I apprehend that they are an exception to that rule, or, if not an exception, they are open to the observation that the notification of the acceptance need not precede the performance. This offer is a continuing offer. It was never revoked . . . and if notice of the acceptance is required the person who makes the offer gets the notice of acceptance contemporaneously with the notice of the performance of the condition. . . . I think, however, the true view in a case of this kind is that the person who makes the offer shows by his language and from the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance."

NOTES

This, as well as the other cases set out in this section, also illustrate that in order to make a valid contract there must be a common intention of the parties; in other words there must be *consensus*. This *consensus* may be vitiated by mistake, as to this see p. 99 *infra*.

It should be observed that where an offer is made to a limited class of persons it can only be accepted by a person who is a member of that class.

In the case of *Wood v. Lectrik, Ltd.*, (*The Times* Newspaper, January 13th 1932), the defendants advertised an electric comb in a periodical in the following terms:—

"New hair in 72 hours. Lectrik Electric Comb. Great news for hair sufferers. What is your trouble? Is it grey hair?

In 10 days not a grey hair left—£500 guarantee."

The plaintiff's hair was prematurely turning grey, and he bought one of these combs and used it as directed. But he said that instead of restoring the original colour of his hair, the comb scratched his head and

made him feel uncomfortable. It was held by Rowlatt, J., that the plaintiff had complied with the advertisement, that accordingly there was a contract, and that the plaintiff was entitled to recover the sum of £500 from the defendants.

If, however, the offer is made to a certain person, it can be accepted by nobody but the offeree. Thus in *Boulton v. Jones* (1857), 2 H. & N. 564, Boulton had taken over the business of Brocklehurst. On the same day he received an offer for the purchase of goods by Jones, which was addressed to Brocklehurst, since Jones did not know that the business had changed hands. Boulton supplied the goods without informing Jones of the true facts. On becoming aware of them, Jones refused to pay. It was held that he was under no obligation to do so, because there was no contract between him and Boulton. Pollock, C. B., said, "if a person intends to contract with A., B. cannot give himself any right under it." A difficulty arose by the offer being addressed to Brocklehurst's business, and it seems to have been suggested that Jones did not mind who actually supplied the goods. This point was disposed of by BRAMWELL, B., who said: "If the plaintiff were now at liberty to sue the defendants, they would be deprived of their right of set-off as against Brocklehurst. When a contract is made, in which the personality of the contracting party is or may be of importance, as a contract with a man to write a book, or the like, or where there might be a set-off, no other person can interpose and adopt the contract. As to the difficulty that the defendants need not pay anybody, I do not see why they should, unless they have made a contract, either express or implied." The last sentence would probably not have been spoken to-day. It is now realised that as far as possible unjustified enrichment should be prevented. See *Craven-Ellis v. Canons, Ltd.*, [1936] 2 K. B. 403, [1936] 2 All E.R. 1066 *infra*, p. 72.

These two cases also afford illustrations of consideration which is essential to every contract. See the case of *Bolton v. Madden*, p. 27.

See Stevens' Elements of Mercantile Law, 10th Edn., pp. 12 *et seq.*

HYDE v. WRENCH

(1840), 3 Beav. 334

- (i) *The acceptance of an offer must be absolute and on the same terms as offered.*
- (ii) *An offer once refused is dead and cannot be accepted subsequently unless it is renewed.*

Facts of the Case

The defendant offered to sell a farm to the plaintiff for £1,200. This was refused. He then wrote as follows:—

"I will only make one more offer which I shall not alter from: that is £1,000 lodged in the bank until Michaelmas, when title shall

be made clear of expenses, land tax, etc. I expect a reply by return, as I have another application."

The plaintiff's agent then called on the defendant, and offered £950. The defendant took time to consider this and later wrote that he was sorry he could not accept the offer. The plaintiff's agent then wrote, noting the refusal and continuing :—

" This being the case, I at once agree to the terms on which you offered the farm, viz., £1,000."

The plaintiff brought an action in Chancery for specific performance.

Decision

The action was dismissed. The **Master of the Rolls** (Lord LANGDALE) said :—

" Under the circumstances stated in this bill, I think there exists no valid binding contract between the parties for the purchase of the property. The defendant offered to sell it for £1,000, and if that had been at once unconditionally accepted, there would undoubtedly have been a perfect binding contract ; instead of that, the plaintiff made an offer of his own, to purchase the property for £950, and he thereby rejected the offer previously made by the defendant. I think that it was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it ; and that, therefore, there exists no obligation of any sort between the parties."

NOTES

The question as to what constitutes an offer is largely one of construction. In *Harvey v. Facey*, [1893] A. C. 552, Harvey telegraphed " Will you sell us Bumper Hall Pen ? Telegraph lowest cash price." The reply was " Lowest price for B.H.P. £900." Harvey telegraphed an acceptance. The Judicial Committee of the Privy Council held that there was no contract, as the second telegram did not constitute an offer, but merely a statement of price in answer to a question. The offer was contained in the last telegram from Harvey.

It should be observed that though a counter-offer made in response to an offer, is equivalent to a refusal of the offer, so that the offer cannot afterwards be accepted (unless it is renewed), nevertheless a mere enquiry as to whether the offeror will modify his terms does not amount to a refusal and counter-offer, and the original offer still remains open for acceptance in such case unless withdrawn. (See *Stevenson v. McLean* (1880), 5 Q. B. D. 346.)

CHILLINGWORTH v. ESCHE

[1924] 1 Ch. 97

Where the acceptance of an offer is made conditional on the execution of a formal contract there is no binding agreement until such formal contract has been drawn up and signed.

Facts of the Case

The plaintiffs and the defendant signed a document dated the 10th July, 1922, by which the plaintiffs agreed to purchase from the defendant freehold land and a nursery for the sum of £4,800, "subject to a proper contract to be prepared by the vendor's solicitors" and the plaintiffs acknowledged having paid £240 "as deposit and in part payment of the said purchase money." Completion of the contract was fixed for November 2nd, 1922. A proper formal contract was prepared by the defendant's solicitors and approved by the plaintiffs' solicitors. The defendant's engrossment of the contract was duly signed by him, but the plaintiffs did not sign their engrossment and they declined to proceed with the purchase and claimed the return of the deposit.

Decision

It was held by the Court of Appeal that the original document of the 10th July, 1922, was conditional only and did not constitute a firm contract, and that the plaintiffs were entitled to recover the deposit.

Lord HANWORTH, M.R., said:—

"I think when you look at the words here used that what was intended was that the whole document should be conditional on the execution of a proper contract, to be prepared by the vendor's solicitors. I think it is not possible to hold that those words were merely the expression of a desire for a further contract. In my opinion the word 'proper' must be given its full meaning, and I think that the intention of the parties was that the full conditions should be considered in a further contract, and that until that further contract was executed there should be no binding contract for the purchase of the property."

NOTES

In *Von Hatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 284, PARKER, J., said:—

"It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored. The fact that the reference to the more formal document is in words which according to their natural construction import a condition is generally if not invariably conclusive against the reference being treated as the expression of a mere desire."

FELTHOUSE v. BINDLEY
(1862), 11 C. B. (N. S.) 869

Mere mental assent is not a sufficient acceptance of an offer. To constitute an acceptance such assent must be communicated to the offeror.

Facts of the Case

John Felthouse, a nephew of the plaintiff, being about to sell his farming stock, treated with the plaintiff for the sale of a horse. There was a misunderstanding as to whether the price was £30 or 30 guineas, and John Felthouse wrote to the plaintiff to clear the matter up. The plaintiff, in his reply, offered to split the difference and to buy the horse for £30 15s. adding :

"If I hear no more about him, I consider the horse is mine at £30 15s."

To this letter the nephew sent no reply, but before the auction he informed the defendant, who was the auctioneer, that the horse in question had been sold. The auctioneer forgot this and sold the horse in the sale. The nephew wrote to the plaintiff apologising for the mistake, and the plaintiff then brought an action against the auctioneer for conversion, by selling the horse which he (the plaintiff) said was his property.

The case turned on the question whether the plaintiff was the owner of the horse at the time of the sale.

Decision

It was held that the plaintiff had no property in the horse at the time of the auction. The letter from the nephew, apologising for

the mistake, though it showed an intention on his part to accept the offer, could not be held to date back so as to bind a third party, and the mere mental assent of the nephew to his uncle's offer (without any communication) did not amount to an acceptance of the offer. There was, therefore, no contract between the plaintiff and his nephew, and so the defendant was not liable to the plaintiff.

In his judgment, WILLES, J., said:—

“ It is clear that the uncle had no right to impose upon the nephew a sale of his horse for £30 15s. unless he chose to comply with the condition of writing to repudiate the offer. The nephew might, no doubt, have bound his uncle to the bargain by writing to him; the uncle might also have retracted his offer at any time before acceptance. It stood an open offer. . . . It is clear that the nephew in his own mind intended the uncle to have the horse at the price which he (the uncle) had named, £30 15s., but he had not communicated such his intention to his uncle, or done anything to bind himself. Nothing therefore had been done to vest the property in the horse in the plaintiff down to the 25th of February, when the horse was sold by the defendant.”

NOTES

This case should be compared with *Carlill v. Carbolic Smoke Ball Co.* (see page 11) which was a case where the offer itself showed that communication of the acceptance of the offer, apart from notification of the performance of the acts required by the offer, was not necessary. That, however, is quite different from a mere mental decision to accept an offer, without any communication—that is not sufficient to constitute an acceptance of an offer, and the communication in this case by the nephew to the defendant (the auctioneer) was insufficient, since the auctioneer was not the agent of the plaintiff.

THE HOUSEHOLD FIRE AND ACCIDENT INSURANCE CO., LTD. v. GRANT

(1879), 4 Ex. D. 216

Where an offer is properly accepted by means of a letter sent through the post, the acceptance is complete, and a binding contract made, as soon as the letter is posted, even though the letter is lost in the post and never reaches the offerer.

Facts of the Case

On September 30th, 1874, the defendant (Grant) handed to K., an agent, for the plaintiff company in Glamorganshire, a written

application for 100 shares in the company. K. sent the application on to the company. On October 20th, 1874, the secretary of the company wrote a letter of allotment of the 100 shares to the defendant, and this letter was posted to the defendant, and his name was then entered on the register of shareholders. The letter was lost in the post and was never received by the defendant. Later the company went into liquidation, and on December 7th, 1877, the Official Liquidator applied to the defendant for the sum of £94 15s., the balance owing in respect of the 100 shares after giving the defendant credit for certain monies due to him. The defendant refused to pay and contended that he was not a shareholder, as he had never received any letter of allotment.

Decision

It was held that the defendant was a shareholder, and that the posting to him of the letter of allotment was an acceptance of his offer, although in fact the letter never reached him, and that accordingly he was liable for the amount claimed in respect of the shares.

In the **Court of Appeal**, BAGGALLAY, L.J., said :—

“Having regard to the passages in Lord COTTFENHAM’s judgment” (that is, in an earlier case of *Dunlop v. Higgins*) “it appears to me impossible to doubt that the proposition which he intended to affirm, and which was in fact his *ratio decidendi*, was this, that when the letter accepting the offer was duly posted, the contract was complete, although it might be delayed in its delivery or might never reach the hands of the party making the offer. I desire, however, to guard myself against being considered as participating in a view of the effect of the decision in *Dunlop v. Higgins* which has sometimes been adopted, . . . viz., that in all cases in which an offer is accepted by a letter addressed to the party making the offer and duly posted, there is a binding contract from the time when such letter is posted. I do not take this view of the effect of the decision in *Dunlop v. Higgins*. On the contrary, I think that the principle established by that case is limited in its application to cases in which, by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorised.”

NOTES

In the case of *Dunlop v. Higgins* (1848), 1 H. L. Cas. 381, referred to above, Dunlop & Co., who were iron masters in Glasgow, addressed letters on January 22nd and 28th, 1845, to Higgins & Co., at Liverpool, offering them 2,000 tons of iron pigs at 65s. per ton. The letter of the

28th reached H. & Co. at 8 a.m. on January 30th, and on the same date they replied by letter, duly addressed to D. & Co., stating "We will take the 2,000 tons pigs you offer us." That letter was erroneously dated the 31st, but in fact was posted on the 30th. Owing to the frosty weather there was some delay in the train service, and the letter was not in fact delivered to D. & Co. until 2 p.m. on February 1st, and then D. & Co. replied to H. & Co.: "We have your letter of yesterday's date but are sorry we cannot now enter 2,000 tons, our offer not being accepted in time." H. & Co. then brought their action, claiming damages from D. & Co. for breach of contract, and they succeeded, the Court holding that their letter of acceptance was posted within a proper and reasonable time and that a binding contract was made as soon as the letter was posted, they not being answerable for the delay of the post office in the transmission of the letter.

The offerer can avoid this difficulty by stipulating in his offer that an acceptance must actually reach him on or before a certain date.

BYRNE *v.* VAN TIENHOVEN

(1880), 5 C. P. D. 344

The withdrawal of an offer is not effective until it reaches the person to whom the offer was made.

Facts of the Case

The plaintiffs carried on business at New York and the defendants at Cardiff. By letter dated the 1st October, 1879, the defendants offered to the plaintiffs 1,000 boxes of tinplates at a certain price. This letter reached the plaintiffs on the 11th October. On the same day they sent a telegram to the defendants accepting the offer, and on the 15th October they wrote a letter to the defendants confirming their acceptance of the offer. On the 8th October the defendants had sent a letter to the plaintiffs withdrawing their offer of the 1st and this letter reached the plaintiffs on the 20th October, whereupon the plaintiffs immediately telegraphed to the defendants demanding shipment of the tinplates and also wrote them a letter insisting upon the completion of the contract. The defendants, however, refused to supply the tinplates and contended that their offer of the 1st October was withdrawn by their letter of the 8th.

Decision

It was held by LINDLEY, J., that the defendants' letter of the 8th October, withdrawing their offer, was not effective until it reached the plaintiffs on the 20th, and that, as a binding contract had already been made by the plaintiffs' acceptance of the defen-

dants' offer on the 11th October, the defendants' letter of withdrawal was inoperative, and they were therefore liable to the plaintiffs for damages for breach of contract by reason of their refusal to supply the tinplates to the plaintiffs.

In the course of his judgment LINDLEY, J., said:—

"There is no doubt that an offer can be withdrawn before it is accepted and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not. . . . For the decision of the present case, however, it is necessary to consider two other questions, viz., (1) Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? (2) Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent? . . . As regards the first question, I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. . . . Against this view, however, it has been urged . . . that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. . . . This view appears to me much more in accordance with the general principles of English law than the view maintained by Pothier. I pass therefore to the next question, viz., whether posting the letter of revocation was a sufficient communication of it to the plaintiff. . . . It may be taken as now settled that where an offer is made and accepted by letters sent through the post the contract is completed the moment the letter accepting the offer is posted. (*Harris* case (1872), L. R. 7 Ch. App. 587; *Dunlop v. Higgins* (1848), 1 H. L. Cas. 381.)

"When however these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or in other words he has made the post office his agent to receive the acceptance and notification of it. But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer, by merely posting a letter; and there is no legal principle or decision which compels me to hold contrary to the fact, that the letter of the 8th October is to be treated as communicated to the plaintiffs on that day, or on any day before the 20th, when the letter reached them."

NOTES

There seems to be one exception to this rule that the revocation of an offer must be communicated to the offeree. In *Dickinson v. Dodds* (1876), 2 Ch. D. 463 and *Carterwright v. Hoogstoel* (1911), 105 L. T. 628

an offer for sale was revoked without communication to the offeree, but the latter heard from trustworthy sources that the offeror had disposed of the property offered to another purchaser. On these facts the Court in both cases concluded that the offer could no longer be accepted. *Dickinson v. Dodds* has given rise to a great deal of discussion, but the details are beyond the scope of this volume. See Stevens' Elements of Mercantile Law, 10th Edn., p. 15-17.

L'ESTRANGE v. GRAUCOB, LTD.,

[1934] 2 K. B. 394

A person accepting an offer made in writing is bound by its terms though he may not have read them, provided such person has not been induced to sign by any misrepresentation.

Facts of the Case

The plaintiff, a shopkeeper, bought an automatic slot machine from the defendants. She signed a printed "Sales Agreement", which among other matters contained the following clause :—"Any express or implied condition, statement, or warranty, statutory or otherwise not stated herein is hereby excluded." The machine did not work satisfactorily, and the plaintiff claimed damages. The defendants relied on the clause, to which the plaintiff replied that, when she signed the agreement she had not read and knew nothing of it, besides the clause was in such small print that it could not be read easily. No misrepresentation on the part of the defendants was proved.

Decision

The **Divisional Court** gave judgment for the defendant. As the plaintiff had signed the written contract, and had not been induced to do so by any misrepresentation, she was bound by the terms of the agreement.

SCRUTTON, L.J., said, at p. 402 :—

"The main question raised in the present case is whether that clause formed part of the contract. If it did, it clearly excluded any condition or warranty."

The learned Lord Justice then referred to the decisions on railway tickets (see pp. 24 *et seq., infra*), and continued :—

"The present case is not a ticket case, and it is distinguishable from the ticket cases. In *Parker v. South Eastern Rail. Co.* (1877), 2 C. P. D. 416, MELLISH, L.J., laid down in a few sentences the law which is applicable to this case. He there said :—

“ ‘ In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents.’ Having said that, he goes on to deal with the ticket cases, where there is no signature to the contractual document, the document being simply handed by the one party to the other: ‘ The parties may, however, reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it; but in that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it. In that case, also, if it is proved that the defendant has assented to the writing constituting the agreement between the parties, it is, in the absence of fraud, immaterial that the defendant had not read the agreement and did not know its contents.’ In cases in which the contract is contained in a railway ticket or other unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed. When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not. . . .

“ In this case the plaintiff has signed a document headed ‘ Sales Agreement,’ which she admits had to do with an intended purchase, and which contained a clause excluding all conditions and warranties. That being so, the plaintiff, having put her signature to the document and not having been induced to do so by any fraud or misrepresentation, cannot be heard to say that she is not bound by the terms of the document because she has not read them.”

MAUGHAM, L.J., said, at p. 407:—

“ In this case it is, in my view, an irrelevant circumstance that the plaintiff did not read, or hear of, the parts of the sales document which are in small print, and that document should have effect according to its terms. I may add, however, that I could wish that the contract had been in a simpler and more usual form. It is unfortunate that the important clause excluding conditions and warranties is in such small print. I also think that the order confirmation form should have contained an express statement to the effect that it was exclusive of all conditions and warranties.”

NOTES

With this case should be compared *Roe v. Naylor (R.A.), Ltd.* (1918), 87 L. J. K. B. 958. There the plaintiff had orally agreed to buy timber from the defendants, who shortly afterwards sent him a sold note. A

clause was printed in small type, sideways, in the margin of the note, providing "That goods are sold subject to their being on hand and at liberty when the order reaches the head office." When the time for delivery arrived a portion of the goods was not available. In spite of the clause the plaintiff's action for damages for non-delivery was successful. The plaintiff had been misled, he had never consented to the clause orally, and later, on being handed the sold note, did not observe it. SCRUTTON, L.J., explained why he thought the plaintiff had been misled: "You get a consecutive document purporting to be a contract, reading consecutively and intelligently from beginning to end, without reference to any other printed clause, and the question, in my view, is one of fact: Have the defendants taken reasonable care . . . to bring to the notice of the other party that . . . another clause on this paper is part of the document?" This the defendant had not done. The clause in the margin, printed sideways would not ordinarily be read by the average business man.

In this connection it is interesting to note that the Hire-Purchase Act, 1938, makes special provision for clear printing of conditions in hire-purchase agreements. S. 2 (2) (c), of the Act, provides as one of the conditions for the validity of those contracts that "The note or memorandum contains a notice, which is at least as prominent as the rest of the contents of the note or memorandum" that the hirer is entitled to determine the agreement.

It should also be observed that a person signing a contract without being able to read it, owing to his ignorance of the English language or otherwise, is not bound by unreasonable terms: *The Luna* [1920], P. 22.

The ticket cases referred to in SCRUTTON's, L.J., judgment are concerned with a similar matter and are dealt with in the following case. They should be read in conjunction with this case.

These cases of mistake regarding the content of an offer should be compared with *Howatson v. Webb*, [1908] 1 Ch. 1, see *infra* p. 99, which deals with mistake in respect of written contracts.

**THOMPSON v. LONDON, MIDLAND AND SCOTTISH
RAIL. CO.,**
[1930] 1 K. B. 41

Reasonable notice of conditions on a ticket.

Facts of the Case

The plaintiff, accompanied by her daughter and her niece, was a passenger on an excursion train run by the defendants from Darwen to Manchester and back. The ticket issued to the

plaintiff had printed on the face of it (*inter alia*) the words "Excursion, for conditions see back." And on the back of the ticket were printed (*inter alia*) the words "Issued subject to the conditions and regulations in the Company's time tables and notices and excursion and other bills." The defendants had issued an excursion bill in which were printed the words "Excursion tickets are issued subject to the notices and conditions shown in the Company's current time tables." And in the company's time table were printed the words "Excursion tickets and tickets issued at fares less than the ordinary fares are issued subject to the general regulations and conditions and also the condition that neither the holders nor any other person shall have any right of action against the Company . . . in respect of . . . injury (fatal or otherwise), loss, damage, or delay however caused."

The plaintiff could not read, but she gave her niece the necessary sum for three half-day excursion tickets from Darwen to Manchester and back, 2s. 7d. each, which was half the ordinary fare. In her evidence the niece stated that nothing was said about handbills or conditions, and she saw no handbill, but her father had been to see if there were excursion trains, and had found that there were, as indicated by some bills hanging up in the company's booking hall.

On the return journey, when the train arrived at Darwen station at about 10 p.m., it was too long for the platform, and had to pull up twice. The plaintiff was told not to get out when the train stopped the first time. The train then drew up the second time and reached the end of the platform, where the ramp begins, and stepping out onto the platform, the plaintiff slipped and was injured.

She brought this action against the defendants for damages, and the jury found (*inter alia*) that the defendants were negligent. The defendants relied upon the above-mentioned conditions, and contended they were under no liability to the plaintiff, but the jury also found that the defendants did not take reasonable steps to bring the conditions to the notice of the plaintiff. The Commissioner of Assize held that there was no evidence that the defendants did not take such reasonable steps, and he gave judgment for the defendants. The plaintiff appealed.

Decision

The **Court of Appeal** affirmed the decision of the Commissioner and dismissed the appeal.

In his judgment, LAWRENCE, L.J., said :—

"The question to be decided is whether there was any evidence upon which the jury could find that the railway company did not

take reasonable steps to bring to the notice of the appellant conditions on which she could be carried . . . The facts of the case are simple. On the ticket issued to the plaintiff's agent there was a statement in plain terms that it was issued subject to conditions which would be found on the back, and on the back there is a plain statement indicating where the conditions subject to which the ticket was issued were to be found. In these circumstances (the notice on the ticket not being tricky or illusory) it seems to me that there is no room for any evidence that the company had not done all that was reasonably necessary as a matter of ordinary practice to call attention to the conditions upon which the ticket was issued. . . . If there were a condition which was unreasonable to the knowledge of the company tendering the ticket, I do not think the passenger would be bound. Here it cannot be said that the condition in question in this case is an unreasonable one, either from the point of view of the company or from that of the passenger. . . . I therefore agree with the learned Commissioner that there was no evidence upon which a jury could properly have found that the company had not taken reasonable steps to bring to the attention of the appellant notice of the condition upon which it was going to carry her between Manchester and Darwen on the occasion in question."

NOTES

In *Henderson v. Stevenson* (1875), L. R. 2 Sc. and D. App. Cas. 470, a passenger received a ticket from a steam packet company, having on the face of it only the words " Dublin and Whitehaven." On the back of the ticket was a condition that the company were not liable for loss, injury or delay to the passenger or to his luggage, whether arising from the act, neglect or default of the company or their servants, or otherwise, but there were no words " See back " on the front of the ticket, and the passenger knew nothing of the condition on the back. His luggage was lost and he sued the company, and it was held by the House of Lords that he was entitled to recover, because the front of the ticket constituted a complete contract and there was nothing to draw his attention to the condition on the back.

In *Parker v. South Eastern Rail. Co.* (1877), 2 C. P. D. 416, the Court of Appeal said that when the question of reasonable notice of conditions on a ticket was left to a jury, the form of the question should be, whether the company did that which was reasonably sufficient to give the plaintiff notice of the condition.

Richardson v. Rowntree, [1894] A. C. 217, was a case in which a passenger by steamer received a folded ticket on which no writing was visible until it was opened. Inside were a number of printed conditions, by one of which the liability of the steamship company was limited to a certain amount. Nothing was said to draw her attention to the conditions. She sustained personal injuries and sued the company for a sum

exceeding the amount specified. The jury found that the passenger knew there was writing on the ticket, but did not know that it contained conditions as to the contract of carriage, and that the company did not do what was reasonably sufficient to give her notice of the condition, and awarded her damages. Both the Court of Appeal and the House of Lords held that there was evidence on which the jury could properly so find in the circumstances.

In the case of *Hood v. Anchor Line (Henderson Bros.), Ltd.*, [1918] A. C. 837, the plaintiff was a passenger on one of the defendant company's steamships going from New York to Glasgow. His clerk obtained his ticket for him. It was in an envelope, and on the front of the envelope was a printed notice, in capitals, requesting the passenger to read the conditions of the enclosed contract. The ticket was in three portions, and on the one retained by the passenger was a notice stating that the ticket was issued subject to the conditions set out, one of which limited the company's liability for loss of or injury to the passenger or his luggage to £10 in the case of a first-class passenger and £5 in the case of a second-class or steerage passenger unless the value of the passenger's luggage in excess was declared and freight paid thereon. The plaintiff did not read the ticket, nor did he know of the conditions. The vessel grounded off the Irish coast and the plaintiff was injured. He sued the defendants, who pleaded that by reason of this condition the plaintiff could not recover more than £10. It was held that the defendants had taken all reasonable steps to bring the condition to the knowledge of the plaintiff and he was bound by it.

These cases should be studied together with *L'Estrange v. Graucob*, *supra*, p. 22.

CONSIDERATION

BOLTON v. MADDEN

(1873), L. R. 9 Q. B. 55

- (i) *The nature of consideration in the case of contracts.*
- (ii) *Consideration need not be adequate, but must be of some value in the eye of the law.*

Facts of the Case

The objects of a charity were elected by the votes of the subscribers, each subscriber having a certain number of votes in proportion to the amount he subscribed. Bolton and Madden were subscribers and they agreed that if Bolton would give 28 votes in favour of a candidate whom Madden wished to have

elected, Madden would in like manner, at the next election, give 28 votes for a candidate whom Bolton wished to see elected. Bolton carried out his agreement by voting for Madden's candidate, but Madden then failed to perform his part of the agreement at the next election and did not vote for Bolton's candidate. Accordingly Bolton subscribed £7 7s. od. to the charity in order to obtain 28 more votes and utilised those votes on behalf of his candidate. He then sued Madden for damages for breach of the agreement, but at the hearing of the case in the Lord Mayor's Court the Judge non-suited Bolton on the ground that there was no legal consideration for Madden's promise. The jury fixed the amount of damages recoverable by Bolton (if any) at £7 7s. od.

Decision

On appeal by Bolton it was held by the **Court of Queen's Bench** that there was a legal consideration for Madden's promise and therefore that the agreement was binding and so Bolton was entitled to recover from Madden the sum of £7 7s. od., the amount of damages fixed by the jury.

In the course of his judgment BLACKBURN, J., said :—

“There can be no doubt that there was an express promise by the defendant and a breach of that promise; but the doubt raised was, whether the consideration was such as to make that promise enforceable at law. The general rule is that an executory agreement, by which the plaintiff agrees to do something else, may be enforced, if what the plaintiff has agreed so to do is ‘either for the benefit of the defendant or to the trouble or prejudice of the plaintiff’ . . . If it be either, the adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the Court when it is sought to be enforced . . . We therefore think the nonsuit cannot be supported, and as there was evidence justifying the jury in assessing the damages as they have done, the rule must be made absolute to enter the verdict for the plaintiff.”

NOTES

Consideration is essential in the case of every simple contract, that is to say, in the case of all contracts except contracts made under seal and contracts of record. Consideration has been defined as “some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.” See the case of *Currie v. Misa* (1875), L. R. 10 Ex. 153.

It was decided in *Thomas v. Thomas*, (1842) 2 Q. B. 851, that consideration must be distinguished from motive, such as fulfilling the wishes of a testator. In that case the testator had expressed the desire that his widow should have a certain house for life; “in consideration

of such desire" an agreement was made between the executors and the widow, according to which the widow should have the house and pay £1 per annum to the executors. It was held that though the "consideration" stated in the agreement was only motive, which by itself would not have supported it, the payment of £1 per annum to the executors was sufficient consideration, and the agreement was valid. See also Stevens' Elements of Mercantile Law, 10th Edn., p. 18.

FOAKES v. BEER

(1884), 9 App. Cas. 605

The payment of a smaller sum is not consideration for the discharge of a debt of a larger amount.

Facts of the Case

Beer obtained judgment against Foakes for a sum of money and costs amounting in all to £2,090 19s. od. Later they entered into an agreement in writing (but not under seal) whereby in consideration of Foakes paying to Beer £500 on the signing of the agreement, and the sum of £150 each half-year until the whole amount of £2,090 19s. od. was paid, Beer agreed not to take any proceedings on the judgment. In pursuance of that agreement Foakes duly paid the total sum of £2,090 19s. od., but Beer then claimed interest on the same as a judgment debt.

Decision

It was held by the **House of Lords** that Beer was entitled to recover such interest and that there was no consideration for the agreement by him not to take any proceedings on the judgment.

In the course of his speech Lord SELBORNE, L.C., said:—

"The doctrine as stated in *Pinnell's Case* (1602), 5 Co. Rep. 117a, is that 'payment of a lesser sum on the day' (it would of course be the same after the day) 'in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum.'"

And Lord FITZGERALD said:—

"The short question then is, in relation to a judgment debt payable immediately and on which the creditor is entitled to have execution, is the payment by the debtor of a part, a sufficient consideration to support a parol agreement by the judgment creditor not to take any proceedings whatever on the judgment for the residue? In my opinion it is not."

NOTES

This decision rests on the principle that a man who promises to do something which it is already legally his duty to do provides a consideration which is lacking in reality.

It should be observed that the same applies to the case of any debt, even though judgment has not actually been obtained for it.

On the other hand, where a creditor agrees to accept a lesser sum in satisfaction, if it is paid on an earlier date than that on which the debt becomes due, or at a different place, then the payment of such lesser sum is consideration for the agreement to accept it in satisfaction. So also, if the creditor agrees to accept something other than cash, that is to say, to accept something different, in satisfaction of a debt, there is also consideration and the agreement is binding on the creditor and the Court will not enquire into the adequacy of the consideration (see per Lord SELBORNE and Lord BLACKBURN in the above case).

Again, where a debtor agrees to pay a composition to his creditors generally, and they all agree to accept it in satisfaction of their respective debts, then also there is consideration and the agreement is binding, the consideration in that case being that there is in effect a new contract made by which the debtor procures the agreement of all the creditors to accept the composition —*Good v. Cheesman* (1831), 2 B. & Ad. 328. In many cases, however, the debtor does nothing that could be construed as consideration. For instance, in *West Yorkshire Darracq Agency, Ltd. v. Coleridge*, [1911] 2 K.B. 326, the directors of a limited company agreed to forgo their respective fees. The liquidator was a party to the agreement, but no consideration moved from him. Nevertheless it was held that the composition agreement was binding on the directors, because the promise by each director was consideration for the promise of all the others, and the liquidator, by becoming a party to the agreement, "obtained the benefit of the consideration which each of the directors gave to his co-directors by waiving his right to fees." In effect, as is explained in Anson's Law of Contract, 19th Ed., p. 105, "a party to such an agreement cannot claim his original debt because to do so would be to commit a fraud on the other creditors." See also Stevens' Elements of Mercantile Law, 10th Edn., p. 20.

RESTRAINT OF TRADE

(1) **NORDENFELT v. THE MAXIM NORDENFELT GUN & AMMUNITION CO., LTD.,**

[1894] A. C. 535.

(2) **HERBERT MORRIS, LTD. v. SAXELBY,**

[1916] 1 A. C. 688

A contract in restraint of trade, if made for consideration, will be binding, provided it is reasonable in its terms, and not contrary to public policy.

Facts of the First Case

The appellant, Nordenfelt, carried on, amongst other things, the business of the manufacture of quick-firing guns and ammunition. In 1886 he formed a company, and the company entered into an agreement with him to purchase his business for £287,000, and he agreed to act as managing director of the company for 5 years, and entered into a covenant restricting his right to carry on trade. In 1888 a new company was formed, the respondents, which took over the business of the former one. The appellant entered into an agreement with the new company that he would not, during the term of 25 years if the company should so long continue to carry on business, engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns, gun-mountings or carriages, gunpowder explosives or ammunition or in any business competing or liable to compete with the business for the time being carried on by the company, save for certain exceptions mentioned. The agreement also provided that the appellant should act as managing director of the company for 7 years at £2,000 a year, plus commission on the net profits. He acted as a director until January, 1890, when he filed a petition against himself in bankruptcy, whereupon he ceased to be a managing director.

In September, 1890, he entered into an agreement to work for a Belgian Society who were manufacturers of quick-firing guns and ammunition, and the respondent company then sued him, claiming (*inter alia*) an injunction restraining him from acting in breach of his agreement, and also damages. The appellant contended that the restrictions imposed on him by the agreement were greater than were reasonably necessary for the protection of the company, and were oppressive and invalid.

Decision in the First Case

The **House of Lords** held that the covenant entered into by the appellant with the company was too wide so far as it extended to prevent him from engaging in *any* business which the company might carry on during the 25 years, but was valid and binding as regarded the gun and ammunition business, and an injunction was accordingly granted against the appellant, and an enquiry ordered as to damages.

In the course of his speech, Lord MACNAGHTEN said :—

“ The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities.”

And later, he added :—

“ For the reasons I have given, I think the only true test in all cases, whether of partial or general restraint, is the test proposed by TINDAL, C. J.: What is a reasonable restraint with reference to the particular case? ”

Facts of the Second Case

The appellants were engineers, their special line being the manufacture and sale of lifting machinery, particularly pulley blocks, runways and travelling cranes. Their head office and works were at Loughborough and they had several branch offices elsewhere. They had none in Ireland, but employed a traveller there. They had devoted much time and money to tabulating information of various kinds for use in their business, including charts giving details of their manufactures and of the strengths of materials used, and a lot of technical information, and also a number of drawings. These documents were treated as confidential, and when they were handed out to any employees, stringent precautions were taken to ensure their return.

Saxelby entered the employment of the appellants in 1901 as

a junior draughtsman, and gradually rose in their service. In 1911, he entered into an agreement with the appellants whereby he was to be employed as an engineer for two years certain, and then subject to four weeks' notice on either side, at a salary of £3 17s. 6d. per week, and by the agreement he covenanted that he would not at any time during a period of seven years from the date of his ceasing to be employed by the appellants, either in the United Kingdom or Ireland, carry on alone or jointly or in connection with any other persons, firm or company or be concerned or assist in the sale or manufacture of pulley blocks, hand overhead runways, electric overhead runways, hand overhead travelling cranes or any part thereof, or be concerned or assist in any business connected with such sale or manufacture. This was substantially a repetition of a clause contained in an earlier agreement made by him with the appellants when he attained twenty-one.

Saxelby left the appellants' service in 1913, and after employment with a French company, he entered the service of a company in Manchester in 1914, who were manufacturers of lifting machinery and competitors of the appellants.

The appellants then brought this action against Saxelby for an injunction restraining him from committing a breach of the said agreement. At the trial they did not claim to enforce the last words of his covenant, "or any part thereof or be concerned or assist as aforesaid in any business connected with such sale or manufacture," but relied on the earlier words of the covenant.

Decision in the Second Case

On appeal, it was held by the **House of Lords** that the covenant in question was wider than was required for the protection of the appellants, and was therefore not enforceable against Saxelby at all.

After pointing out that there was a distinction between the case of a purchaser of the goodwill of a business taking a covenant from his vendor in restraint of trade, and the case of the owner of a business taking such a covenant from his servant or apprentice, Lord PARKER said :—

"The goodwill of a business is immune from the danger of the owner exercising his personal knowledge and skill to its detriment, and if the purchaser is to take over such goodwill with all its advantages it must, in his hands, remain similarly immune. Without, therefore, a covenant on the part of the vendor against competition, a purchaser would not get what he is contracting to buy. . . . The covenant against competition is, therefore, reasonable if confined to the area within which it would in all probability ensue to the injury of the purchaser. It is quite different in the

case of an employer taking such a covenant from his employee or apprentice . . . I cannot find any case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the Court. Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilise information confidentially obtained."

And Lord ATKINSON said :—

" In all cases such as this, one has to ask oneself what are the interests of the employer that are to be protected, and against what is he entitled to have them protected? He is undoubtedly entitled to have his interest in his trade secrets protected, such as secret processes of manufacture which may be of vast value. And that protection may be secured by restraining the employee from divulging these secrets or putting them to his own use. He is also entitled not to have his old customers by solicitation or such other means enticed away from him. But freedom from all competition *per se* apart from both these things, however lucrative it might be to him, he is not entitled to be protected against. He must be prepared to encounter that even at the hands of a former employee."

NOTES

But in the case of *Fitch v. Dewes*, [1921] 2 A. C. 158, a restriction against practising as a solicitor, or entering the service of any other solicitor, within a certain area, imposed by agreement by a solicitor on his managing clerk, was upheld by the House of Lords, although it was unlimited in time, on the ground that the restriction was reasonable under all the circumstances of the case, and not opposed to public policy.

In all cases of agreements in restraint of trade, whoever the parties may be, there must be consideration for the agreement even though it is made by deed. (See *Mitchel v. Reynolds* (1711), 1 P. Wms. 181.) In the case of such an agreement being made on the sale of a business, the consideration will usually be the purchase-price paid by the purchaser for the business, and in the case of an agreement being entered into between an employer and his servant, the consideration is usually the agreement to employ the servant. The position of a solicitor's managing clerk is a particularly confidential one.

The question as to whether the restriction is reasonable in its terms, or not, is a matter to be decided by the Court, that is the

judge who tries the case, and not by the jury. (See *Dowden and Pook, Ltd. v. Pook*, [1904] 1 K. B. 45.)

Sometimes the restrictions may be severed, and one part upheld as being reasonable, and another part rejected, as in the above case of *Nordenfelt*, but where the agreement is not severable, then if any substantial part is unreasonable (or contrary to public policy) the whole will be invalid. (See *Attwood v. Lamont*, [1920] 3 K. B. 571; *Putsman v. Taylor*, [1927] 1 K. B. 637, *affirmed*, [1927] 1 K. B. 741.) It should, however, be borne in mind that an agreement merely to limit competition will not be sustained. In *Vancouver Malt and Sake Brewing Co., Ltd. v. Vancouver Breweries, Ltd.*, [1934] A. C. 181, nothing was in effect sold, but the appellants bound themselves not to brew beer. It was held that such an agreement was in restraint of trade and void. Lord MACMILLAN said:—"The covenants restrictive of competition which have been sustained have all been ancillary to some main transaction, contract, or arrangement, and have been justified because they were reasonably necessary to render that transaction, contract, or arrangement effective." Quite apart from this the covenants were too wide, and therefore unreasonable.

An agreement in restraint of trade forms part of the goodwill of a business, and the benefit of the agreement will pass on an assignment of the goodwill, unless there is any stipulation to the contrary. (See *Jacoby v. Whitmore* (1883), 49 L. T. 335.)

Where a restriction of this kind is imposed by an employer on his servant by an agreement of service entered into between them, and subsequently the employer dismisses the servant without notice, and without just cause, that amounts to a repudiation by the employer of the whole agreement of service, including this particular restriction, and the result then is that the servant is entirely freed from the restriction for the future. (See *General Billposting Co. v. Atkinson*, [1909] A. C. 118.) And the same applies where the employer is a company which is wound up. (See *Measures Bros., Ltd. v. Measures*, [1910] 2 Ch. 248.)

As to the position of the vendor of a business, in the absence of any agreement restricting his right to carry on trade, see the case of *Trego v. Hunt*, [1896] A. C. 7, which is set out on page 140.

The subject of restraint of trade should be studied in relation to the law of Trade Combinations, see *infra*, p. 51. As regards illegality generally reference should be made to the Gaming Acts and their special application to Stock Exchange transactions, *infra*, p. 325. See also Stevens' Elements of Mercantile Law, 10th Edn., pp. 26 *et seq.*

MONEY PAID UNDER ILLEGAL CONTRACTS

KEARLEY v. THOMSON

(1890), 24 Q. B. D. 742

Money paid or goods delivered for an illegal purpose cannot be recovered back.

Facts of the Case

The defendants, a firm of solicitors, acted for the petitioning creditor of a bankrupt and had a claim against the bankrupt's estate for their costs. They agreed with the plaintiff, who was a friend of the bankrupt, that they would not appear at the public examination of the bankrupt, nor oppose his discharge, on the plaintiff's undertaking to pay them their costs. They did not appear at the public examination, but before an application was made for the discharge, the plaintiff claimed the return of the money which he had paid to the solicitors.

Decision

The **Court of Appeal** dismissed the action. The contract was illegal, and the partial performance of it prevented the plaintiff from recovering back the money paid under it.

FRY, L.J., said, at p. 745:—

“The tendency of such a bargain as that entered into between the plaintiff and the defendants is obviously to pervert the course of justice. . . . I think, therefore, there can be no doubt the agreement must be taken to be illegal.

“As a general rule, where the plaintiff cannot get at the money which he seeks to recover without showing the illegal contract, he cannot succeed. In such a case the usual rule is *potior est conditio defendantis*. There is another general rule which may be thus stated, that where there is a voluntary payment of money it cannot be recovered back. It follows in the present case that the plaintiff who paid the £40 cannot recover it back without showing the contract upon which it was paid, and when he shows that he shows an illegal contract. The general rule applicable to such a case is laid down in the very elaborate judgment in *Collins v. Blantern*, (1 Smith L. C. 7th ed. 369), where the Lord Chief Justice says:—‘Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the Court to fetch it back again: you shall not have a right of action when

you come into a Court of Justice in this unclean manner to recover it back.' To that general rule there are undoubtedly several exceptions, or apparent exceptions. One of those is the case of oppressor and oppressed, in which case usually the oppressed party may recover the money back from the oppressor. In that class of cases the *delictum* is not *per*, and therefore the maxim does not apply. Again, there are other illegalities which arise where a statute has been intended to protect a class of persons, and the person seeking to recover is a member of the protected class. Instances of that description are familiar in the case of contracts void for usury under the old statutes, and other instances are to be found in the books under other statutes, which are, I believe, now repealed, such as those directed against lottery keepers. In these cases of oppressor and oppressed, or of a class protected by statute, the one may recover from the other, notwithstanding that both have been parties to the illegal contract."

NOTES

In *Harry Parker, Ltd. v. Mason*, [1940] 2 K. B. 590 A claimed damages from B for fraudulent misrepresentation. The evidence showed that A and B had conspired that A should make a sham bet on a race course to mislead the public. A had agreed to do so because B had fraudulently stated he could "square" all the jockeys in the race. A had paid the money in reliance on this statement. B had in fact "squared" some jockeys, which meant that part of the illegal purpose had been carried out, and A could not recover. MACKINNON, L. J., said that in the case of an illegal contract the Court drives both parties from its presence.

"If repentance takes place before the time for performance of the illegal purpose, the penitent may claim the return of his money, but if, as here, the time of performance has passed, the repentance of one is of no avail and he cannot claim his money on the ground that his partner in guilt has not in fact performed his promise, but has merely pocketed the money."

In this case part of the illegality had in fact occurred.

As indicated by MACKINNON, L. J., *supra*, if the illegal purpose has not been carried out money or goods can be recovered back. Thus in *Taylor v. Bowers* (1876), 1 Q. B. D. 291, the plaintiff, who was in financial difficulties, made over all his stock-in-trade to Alcock, his nephew, to prevent his creditors getting hold of the goods. The defendant, who was one of the creditors, knew of the scheme to defraud the other creditors. Some months afterwards Alcock executed a bill of sale of the goods to the defendant, for the alleged purpose of securing the debt due from the plaintiff to the defendant. The plaintiff did not know of this latter transaction. Meanwhile two creditors' meetings had been held, but no compromise had been arrived at. The plaintiff sued the defendant for recovery of the goods, and the Court of Appeal

gave judgment for him, as the illegal purpose of defrauding the creditors had not been carried out. MELLISH, L. J., said :—

" To hold that the plaintiff is enabled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined upon, and before the parties took any steps to carry it out. That, I apprehend, is the true distinction in point of law. If money is paid, or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out ; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action ; the law will not allow that to be done."

See for an important application of this principle *Harse v. Pearl Life Assurance Co.*, [1904] 1 K. B. 558, illustrated at p. 242 *infra*. See also generally, Stevens' Elements of Mercantile Law, 10th Edn., p. 34.

INFANTS' CONTRACTS

R. LESLIE, LTD. v. SHEILL,
[1914] 3 K. B. 607

An infant cannot be sued in any form of action on a contract which is void under the Infants' Relief Act, 1874.

Facts of the Case

The defendant, an infant, obtained loans from the plaintiffs, a firm of money-lenders, by fraudulently representing himself to be of full age. The plaintiffs sued him for £475, the amount of the loans with interest, on the ground that they had been obtained by fraudulent misrepresentation ; in the alternative, they claimed the same amount as money had and received to their use.

Decision

On appeal it was held by the **Court of Appeal** that the plaintiffs could not recover. The first cause of action failed because it was held to be well settled that in the case of an infant

" he is not answerable for a tort directly connected with a contract which as an infant he would be entitled to avoid "

(per Lord SUMNER) ;

and A. T. LAWRENCE, J., said :—

" To hold him responsible in damages for such frauds would in effect be to hold him responsible for the contract so obtained."

The **Court of Appeal** further held that the second cause of action failed also and on this part of the case Lord SUMNER said :—

" In the present case there is clearly no accounting. There is no fiduciary relation. The money was paid over in order to be used as the defendant's own, and he has so used it and, I suppose, spent it. There is no question of tracing it, no possibility of restoring the very thing got by fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word, nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract. So far as I can find, the Court of Chancery never would have enforced any liability under circumstances like the present, any more than a Court of Law would have done so."

NOTES

Section 1 of the Infants' Relief Act, 1874, provides that: " All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent or for goods supplied or to be supplied (other than contracts for necessaries) and all accounts stated with infants shall be absolutely void."

In the case of *Stocks v. Wilson*, [1913] 2 K. B. 235, the defendant, an infant, by fraudulently representing that he was 21, induced the plaintiff to sell and deliver to him some furniture and effects for £300. They were not necessaries. The defendant sold some of the goods for £30, and, with the plaintiff's knowledge, he granted a bill of sale over the rest of the goods as security for a loan of £100. He did not pay the plaintiff the agreed purchase-price of the goods. In an action by the plaintiff, it was held by LUSII, J., that, though the defendant could not be made liable on the contract to pay the £300, nevertheless, in pursuance of the Court's equitable jurisdiction to order restitution of property obtained by fraud, the defendant was liable to account to the plaintiff for the two sums of £30 and £100 which he had obtained by the sale and the bill of sale of the goods obtained from the plaintiff, less a sum which was due from the plaintiff to the defendant himself.

In the above case of *R. Leslie, Ltd. v. Sheill*, the plaintiffs sought to invoke the principles of the case of *Stocks v. Wilson*, but, as Lord SUMNER explained in the judgment quoted above, the defendant, Sheil, was not in the position of an accounting party at all, and the equitable principles of restitution could, therefore, not be applied merely to enforce the payment of money obtained by an infant under a contract which was void. See also Stevens' Elements of Mercantile Law, 10th Edn., pp. 37 *et seq.*

CLEMENTS v. LONDON AND NORTH WESTERN RAIL. CO.,

[1894] 2 Q. B. 482

An agreement entered into by an infant, which is part of a contract of service, will be enforced, even against him, if it is reasonable and, on the whole, for his benefit.

Facts of the Case

Clements, when under age, entered into the service of the Railway Company as a porter. He became a member of an insurance society formed among the employees. Members of this society received pecuniary relief in the event of disablement arising out of accidents. The Railway Company made agreed contributions to the funds of this society in respect of each employee, and each employee signed an agreement with the Railway Company to accept the contributions made by the Railway Company and any advantages to which he might be entitled under the rules of the society, in lieu of any claims which he or his representatives might have made under or by reason of the provisions of the Employers' Liability Act, 1880, or any Acts amending the same. Clements signed such agreement in the usual form, and also signed a form of proposal to become a member of the society. While still an infant, Clements was injured and received pecuniary benefit according to the terms of the agreement and the rules of the society. He then brought an action for damages against the Company in respect of his injury, and alleged that he was not bound by the agreement signed by him.

Decision

The **Court of Appeal** held that the agreement was part of Clements' contract of service, and as it was reasonable and, on the whole, for his benefit it was binding upon him.

In the course of his judgment Lord ESHER, M.R., said:—

“That raises this question of law—whether this is a contract which he can now repudiate, he being still an infant.

“I am of opinion, without going again through the cases that have been cited, that the answer to this proposition depends on whether, on the true construction of the contract as a whole, it was for his advantage. If it was not so, he can repudiate it; but if it was for his advantage, it was not a voidable contract, but one binding upon him which he had no right to repudiate.”

And later he added :—

“ Some disadvantages to the infant have been pointed out in the contract ; but it does not prevent the contract being for the advantage of the infant that it contains some things that are not to his advantage. If, upon consideration of the whole agreement, there is a manifest advantage to the infant, he cannot avoid it.”

NOTES

As to contracts which are binding upon an infant see Stevens' *Elements of Mercantile Law*, 10th Edn., pp. 39 *et seq.* The principal difficulties which have arisen under this head have concerned the precise scope to be given to contracts of service or for teaching. The tendency has been to extend these categories.

In *Roberts v. Gray*, [1913] 1 K. B. 520, G., an infant, had agreed to go on a billiard-playing tour with R., and it was held that he was liable for damages for breach of that contract, because the contract, as a whole, was for his benefit and reasonable, and therefore he could not repudiate it. *Clements v. London and North Western Rail. Co.*, *supra*, was followed in *Doyle v. White City Stadium, Ltd.*, [1935] 1 K. B. 110. In this case a contract was made between an infant boxer and the British Boxing Board providing that the Board should grant the infant a boxing licence, which would enable him to take part in matches for championships. Later, doubts arose as to the validity of the contract. The majority of the Court of Appeal held that such a contract was so nearly connected with the contracts of employment that the decision in *Clements*' case was ample authority.

The case of *De Francesco v. Barnum* (1890), 45 Ch. D. 430, is an instance where an apprenticeship agreement between an infant and a teacher of dancing was held to be unreasonable, because, among other matters, it bound the parties for seven years, during which the infant was not allowed to accept any engagements other than those approved by the master, but the latter undertook no duty to provide engagements, or to pay wages except in the event of actual engagements. Moreover, the master was given the right to terminate the agreement at any time if after a fair trial the infant should prove unfit to dance, but there was no provision as to what was to be regarded as a fair trial. In the words of FRY, L.J., the contract placed the infant “ absolutely at the disposal of the teacher.” It was not for the infant's benefit, and not binding on her.

Where part only of an infant's contract of service is unreasonable, and the other part is free from objection, and the two parts are severable, then the part which is unreasonable may be disregarded but the other part will still be binding on the infant. This is illustrated by the case of *Bromley v. Smith*, [1909] 2 K. B. 235.

NASH v. INMAN,
 [1908] 2 K. B. 1

In an action against an infant for necessaries, the onus is on the plaintiff to prove, not only that the goods were suitable to the condition in life of the infant, but also that he was not sufficiently supplied with goods of that class at the time of the sale and delivery.

Facts of the Case

Nash, a tailor in Savile Row, London, sent his traveller to call on Inman, a Cambridge undergraduate, who was an infant at the time. He was the son of an architect of good position, who had a town house at Hampstead and a country establishment as well. He ordered a large amount of expensive goods from Nash, including eleven fancy waistcoats. Nash issued a writ for the amount, and Inman pleaded infancy. At the trial, Inman's father proved Inman's infancy and stated that, at the time, he was amply supplied with clothes. RIDLEY, J., held that there was no evidence to go to the jury that the goods were necessaries.

Nash appealed.

Decision

The **Court of Appeal** dismissed the appeal, holding that the plaintiff must prove not only that the goods were necessaries, but also that the infant was not sufficiently supplied with them at the time, which, in this case, had not been done. In his judgment, COZENS-HARDY, M.R., discussed the definition of necessaries in section 2 of the Sale of Goods Act, 1893, and said : —

"It is not sufficient, in my view, for him (the plaintiff) to say, 'I have discharged the onus which rests upon me if I simply show that the goods supplied were suitable to the condition in life of the infant at the time.' There is another branch of the definition, which cannot be disregarded. Having shown that the goods were suitable to the condition in life of the infant, he must then go on to show that they were suitable to his actual requirements at the time of the sale and delivery."

NOTES

The definition of "Necessaries" in section 2 of the Sale of Goods Act, 1893, referred to by COZENS-HARDY, M.R., in his judgment is as follows : —

"Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery."

It should be observed that an infant cannot be sued on a bill of exchange or promissory note, even though it is given for the price of necessaries supplied to him. (See *Re Soltykoff, Ex parte Margrett*, [1891] 1 Q. B. 413.) But he can be sued for the price.

An infant cannot recover money paid by him under a void contract unless there has been a total failure of consideration. In *Valentini v. Canali*, (1889), 24 Q. B. D. 166, Lord COLERIDGE, L.C.J., said:—

“ When an infant has paid for something and has consumed it or used it, it is contrary to natural justice that he should recover back the money which he has paid.”

Thus in *Steinberg v. Scala (Leeds), Ltd.*, [1923] 2 Ch. 452, the plaintiff sought to recover money paid by her when an infant in respect of shares in the defendant company. She had received no dividends on shares, nor attended any meetings, but it was proved that at one time the shares had a substantial value. The company did not dispute the right to have her name removed from the register of shareholders, but they resisted her claim to the return of the money paid on the shares. It was held that since the shares had, when purchased, been of some value, there was no total failure of consideration and the plaintiff could not recover. Likewise, in *Pearce v. Brain*, [1929] 2 K. B. 310, where an infant exchanged a motor-cycle and side-car for a second-hand motor-car it was held that he could not recover back his motor-cycle and side-car, because, though the car broke down shortly after the purchase, it was of some value. But in *Corpe v. Overton* (1833), 10 Bing 252, where the consideration entirely failed, the infant plaintiff recovered the money he had paid under a contract. Thus where in a case, otherwise similar to that of *Steinberg v. Scala*, the shares were absolutely worthless from the beginning, the infant could recover; see *Hamilton v. Vaughan Sherrin Electrical Engineering Co.*, [1894] 3 Ch. 589. See Stevens' Elements of Mercantile Law, 10th Edn., pp. 41 *et seq.*

LUNATICS' CONTRACTS

THE IMPERIAL LOAN CO., LTD. v. STONE,
[1892] 1 Q. B. 599

To succeed in a defence of insanity to an action of contract the defendant must prove that the plaintiff knew of the insanity at the time of the contract.

Facts of the Case

The plaintiffs brought an action against the defendant on a promissory note which he had signed as surety. The defence

alleged that the defendant was so insane at the time as to be incapable of understanding what he was doing and that this fact was known to the plaintiffs.

The jury found that the defendant was so insane at the time, but could not agree as to the knowledge of the plaintiffs. Judgment was entered for the defendant, and the plaintiffs appealed.

Decision

The Court of Appeal ordered a new trial.

Lord ESHIER, M.R., said :—

“ When a person enters into a contract and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.”

NOTES

The fact that the plaintiff subsequently learns that, at the time of the contract, the defendant was insane, is not sufficient—it must be proved by the defendant that the plaintiff knew this at the time of the contract. (See *York Glass Co. v. Jubb* (1924), 131 L. T. 559.)

A lunatic so found by inquisition cannot contract, even during a lucid interval. (See *Re Walker*, [1905] 1 Ch. 160.)

It may be mentioned here that a contract of a man too drunk to know what he is doing is voidable by him provided, just as in the case of lunatics, the other party is aware of such incapacity. But if he ratifies it, when sober, the contract will then be binding on him. (See *Matthews v. Baxter* (1873), L. R. 8 Ex. 132.) See also Stevens' Elements of Mercantile Law, 10th Edn., p. 47.

CONTRACTS BY MARRIED WOMEN

MOREL BROS. v. WESTMORLAND,
[1903] 1 K. B. 64; *affirmed*, [1904] A. C. 11

This case is fully dealt with at p. 129 *infra*. For the contracts made by married women generally, reference should be made to Stevens' Elements of Mercantile Law, 10th Edn., p. 44.

STRANGERS TO CONTRACT

DUNLOP PNEUMATIC TYRE CO., LTD. v. SELFRIDGE & CO., LTD.,
[1915] A. C. 847

A stranger to a contract cannot sue upon it.

Facts of the Case

The Dunlop Company supplied motor tyres and covers to A. J. Dew & Co., who were motor accessory dealers. By an agreement in writing between the Dunlop Company and Dew & Co., in consideration of certain trade discounts Dew & Co. agreed to purchase a quantity of Dunlop motor tyres, covers, tubes and sundries and not to sell the same below the list prices, except to persons engaged in the motor trade. They agreed further that when they sold any of the goods to a motor trader below the list prices, they would, as agents for the Dunlop Company in that behalf, obtain a written undertaking from the trader that he would similarly observe the Dunlop list prices, and would forward such undertaking to the Dunlop Company.

Selfridge & Co. accepted two orders from customers for Dunlop covers, below the current list prices. They obtained these covers from Dew & Co., at a discount, and signed an agreement not to sell or offer them below the current list prices, and in another clause of the agreement they undertook to pay £5 to the Dunlop Company, by way of liquidated damages, for each sale or offer in breach of this agreement. This agreement was returned to Dew & Co., duly signed by Selfridge & Co. Selfridge & Co. actually supplied one of the two covers so ordered at less than the Dunlop Company's current list price, but as to the other one, they later informed their customer they could only supply it at the list price.

The Dunlop Company now claimed an injunction and damages against Selfridge & Co. for the breach of this agreement, alleging that Dew & Co. had acted as their agents in making the agreement with Selfridge & Co.

Decision

On appeal, the **House of Lords** held that there was no contract between the Dunlop Company and Selfridge & Co., and that even assuming that the Dunlop Company were undisclosed principals, still there was no consideration as between them and Selfridge & Co., since the whole of the purchase price was paid direct to Dew & Co., and therefore, for both reasons, the Dunlop Company's claim failed.

Viscount HALDANE, L.C., said :—

“ In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue upon it. . . . A second principle is that if a person with whom a contract, not under seal, has been made is to be able to enforce it, consideration must have been given by him to the promisor or to some other person at the promisor's request. . . . A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as his agent. But, again, in order to entitle him so to sue, he must have given consideration either personally, or through the promisee, acting as his agent in giving it.”

NOTES

It was at one time suggested that where the person who was to receive a benefit under a contract, was related by ties of blood to the party to whom the promise was made, he could sue upon it, though not a party to it himself. But this is not so. (See *Tweddle v. Atkinson* (1861), 1 B. & S. 393.)

One of the fundamental rules of common law, governing the law of contract, is that consideration must move from the promisee. In other words, a promise can be enforced only by somebody who has himself given consideration, and not by the person for whose benefit the promise was made. In this case Dunlops could not recover, though they had in effect received a promise from Selfridge's, because the consideration had moved from Dew & Co. This case is an authority for the proposition that a third party, for whose benefit a contract is made, cannot enforce it though the parties intended to confer such right on him.

This is a very inconvenient situation, for there often exists a genuine and legitimate desire to give a right of action to a third party.

(i) The Legislature has established certain exceptions. Those most important from the point of view of the commercial lawyer are the following :—Under s. 36 (4), of the Road Traffic Act, 1930, persons specified in motor insurance policies are given the right to sue the insurer, though they are not parties to the contract of insurance. Thus, to use the terms of the common law, if in a policy between a company and A, the company promises to insure not only A but also members of his family, such members may sue the Company, in spite of the fact that they have not given consideration for the promise which the Company has made to them. Again, s. 14 (2), of the Marine Insurance Act, 1906, provides that a mortgagee or other person interested in the subject-matter of insurance may insure on behalf of, and for the benefit of, other persons interested as well as on his own behalf. See also s. 17 (2), Agricultural Marketing Act, 1933, which authorises the Board to sue on contracts to which it is not a party.

(ii) More far-reaching from one point of view, however, are certain judicial decisions. In the first place the Courts have held that certain rights can, as it were, attach to things, and thus bind anybody who

becomes possessed of them. The most important decision in this respect is that in *Lord Strathcona SS. Co. v. Dominion Coal Co.*, [1926] A. C. 108. The Dominion Co. were the charterers of a ship, which was sold to the Strathcona Company, while the charter party was still on foot. Though the latter were at all material times aware of the Dominion Company's rights under the charter, they attempted to use the vessel in a manner inconsistent with the charter. They claimed that they had a perfect right to do so, the charter not binding them, since it was made between different parties. Nevertheless the Privy Council held that the Strathcona Company were bound by the charter, because they had bought the ship not only with notice of it, but under the condition that they should respect the charterers' rights. An injunction was granted restraining the Strathcona Company from using the vessel in a way contrary to the terms of the charter. It should be observed that an equitable remedy was sought in that case, but there is no reason in logic why the Strathcona Company should not have been held entitled to sue the charterers for hire. However, this point did not arise, and the *Strathcona Case* seems to establish only a very narrow proposition, namely that a condition can be attached to ships to run with them and bind future owners. It is not possible, as the law stands, to rely on this case in order to support price maintenance conditions in respect of goods. In *McGruther v. Pitcher*, [1904] 2 Ch. 306, the plaintiff was the licensee of the owner of a patent granted in respect of a certain article. He stuck a printed slip inside each box in which the article was sold, prohibiting the re-sale of it below a certain price. When a retailer sold the article at a sum less than that price, the plaintiff sought to restrain him from doing so. However, he did not succeed. There was no contract between the parties and conditions could not by this means be made to run with goods. It should be observed that McGruther sued simply for breach of contract, and not in reliance on their rights as licensees of the patentee. A patentee is entitled by virtue of the rights conferred on him by his letters patent to fix the condition on which goods manufactured under the patent shall be sold. He can enforce these conditions by an action in tort (see *National Phonograph Co. of Australia v. Menck*, [1911] A. C. 363, where the sale of phonograph records below the fixed price was held to be wrongful). *McGruther v. Pitcher* would seem to be unaffected by the later decision in the Strathcona case.

(iii) Still, in some circumstances the Courts will help a third party, for whose benefit a contract is made, by implying that the original party to the contract agreed to hold the third party's right in trust for him. Since a beneficiary under a trust is, under certain conditions, entitled to sue in his own name on contracts made by the trustee for his benefit, a way seems to exist whereby contracts for the benefit of third parties may be enforced. The leading case in this respect is that of *Les Affréteurs Réunis Société Anonyme v. Walford (Leopold.) (London), Ltd.*, [1919] A. C. 801. In a charter

party it had been agreed that the owner should pay the broker who had negotiated it a commission, and it was held that the charterers had contracted for the commission as trustees for the broker. Consequently the broker was allowed to sue the owners direct. At first sight this case may seem to promise a solution of the problem. However, in the first place the procedural difficulties in the path of a beneficiary wishing to sue on the contracts made by the trustee are considerable; in fact in the *Walford Case* the action was so brought by consent. Secondly, it is not easy to prove that a trust was established, and cases which were very similar in their facts have been decided the other way. The main rule illustrated by *Dunlop v. Selfridge* remains dominant in spite of its practical inconveniences. Proposals have been made for its modification by statute.

LUMLEY v. GYE
(1853), 2 E. & B. 216

A third party must not interfere with the contractual rights of others.

Facts of the Case

The plaintiff, who was lessee and manager of the Queen's Theatre, entered into a contract with Johanna Wagner, an opera singer, to perform in his theatre for a period of three months; a condition of the contract was that she should not perform elsewhere without the plaintiff's consent. The defendant, knowing of the contract, enticed Wagner to refuse to perform. The plaintiff brought an action against the defendant for procuring a breach of contract.

Decision

It was held in the **Queen's Bench** that an action would lie for procuring a breach of contract to give exclusive personal services, provided the procurement took place during the subsistence of the contract and caused damage, and that it did not matter whether the period of the employment had actually commenced or not, nor was it necessary that the employer and employed should stand in the strict relation of master and servant.

In the course of his judgment, CROMPTON, J., said:—

“ It must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harbouring and keeping him as servant after he has quitted it and during the time stipulated for as the period of service, whereby the

master is injured, commits a wrongful act for which he is responsible at law. I think that the rule applies wherever the wrongful interruption operates to prevent the service during the time for which the parties have contracted that the service shall continue; and I think that the relation of master and servant subsists, sufficiently for the purpose of such action, during the time for which there is in existence a binding contract of hiring and service between the parties. . . . The wrong and injury are surely the same, whether the wrongdoer entices away the gardener who has hired himself for a year, the night before he is to go to his work, or after he has planted the first cabbage on the first morning of his service."

And later in his judgment he added :—

" In deciding this case on the narrower ground, I wish by no means to be considered . . . as saying that in no case except that of master and servant is an action maintainable for maliciously inducing another to break a contract to the injury of the person with whom such contract has been made."

NOTES

In *Temperton v. Russell*, [1893] 1 Q. B. 715, Temperton, a builder, obtained damages against the defendants for procuring a breach of a contract by persons who had agreed to supply him with materials. Lord ESHER, M.R., made it clear that the action was not confined to cases of procuring breaches of contracts for personal services.

Generally, it is not actionable merely to induce a person to terminate an existing contract in a lawful way, or to induce him not to make a contract with someone else, provided no unlawful means are used. Thus, in *Allen v. Flood*, [1898] A. C. 1, Flood and Taylor were shipwrights employed by the G. Company on repairs to a ship. Some other men (ironworkers) objected to F. and T. being so employed and told Allen, a trade union delegate, that they intended to stop work. A. told the G. Company that unless F. and T. were discharged the ironworkers would stop work. There was evidence that this was being done to punish F. and T. for previously working at ironwork for another firm. The G. Company, to avoid a stoppage, discharged F. and T. but did not break their contracts of service, as they were only employed by the day. F. and T. then sued A. for damages, but it was held by the House of Lords that as there had been no breach of contract, and as A. had not used any unlawful means of coercion with the G. Company, F. and T. had no claim against him and that the mere proof of malice on the part of A. did not make him liable.

But if two or more persons combine or conspire together, without justification or excuse, *to injure a third party* in his trade by inducing his customers not to deal with him, or his servants not to remain in his employment, *and thereby cause damage to that party*, he has a right of action against them for damages, even without proof of any actual

breaches of contract. (See per Lord MACNAGHTEN in *Quinn v. Leathem*, [1901] A. C. 495, at pp. 510, 511.)

And the same applies if *threats or coercion* are used, either by a body of persons or by a single person, for the purpose of injuring a person in his trade or profession and damage results. (See *Allen v. Flood*; and *Quinn v. Leathem*; and also *Pratt v. British Medical Association*, [1919] 1 K. B. 244.)

But where a combination is formed, or acts, not for the purpose of injuring anyone else, but *simply to forward or protect the trade interests of the members* of the combination, and with that sole object in view, and, *without using any unlawful means*, they threaten to withhold future supplies of goods from a particular person, then, even though he suffers damage, he has no right of action against the combination or its members. (See *Ware and De Freville, Ltd. v. Motor Trade Association*, [1921] 3 K. B. 40, fully set out *infra*, p. 51.)

The Trade Disputes Act, 1906, should be noticed. By section 3, of that Act, it is provided that :—

“ An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment, or that it is an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of his capital or labour as he wills.”

The Trade Disputes and Trade Unions Act, 1927, section 1, which limited this protection, was repealed by Trade Disputes and Trade Unions Act, 1946, s. 1.

The words “ trade dispute ” in the 1906 Act mean a dispute either between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person. (See 1906 Act, section 5 (3).)

But even where a person who induces another to break a contract of service proves that he was acting in contemplation or furtherance of a trade dispute, nevertheless the Act of 1906 does not protect him from liability for damage suffered, if he used *threats or violence* to bring about his purpose. (See *Conway v. Wade*, [1909] A. C. 506, per Lord LOREBURN, at page 511; and *Valentine v. Hyde* [1919] 2 Ch. 129.)

A trade union itself, whether of workmen or masters, cannot be sued in any case for a wrongful act; see Trades Union Act, 1871, and the Trade Disputes Act, 1906, section 4. This immunity extends to torts, for instance ordinary libels, not committed in furtherance of trade disputes, and benefits even unions formed for the purpose of imposing restrictive conditions on the conduct of any trade or business. See the stop-list case of *Hardie and Lane, Ltd. v. Chiltern*, [1928] 1 K. B. 663, and compare *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A. C. 107. See also Stevens' Elements of Mercantile Law, 10th Edn., p. 55-58.

TRADE COMBINATION & STOP LISTS

WARE AND DE FREVILLE, LTD. v. MOTOR TRADE ASSOCIATION,
[1921] 3 K. B. 40

“Stop lists” kept by trade protection associations are not in themselves illegal; and to issue or publish them is not of itself a wrongful act.

Facts of the Case

The defendant association had as their object the protection of manufacturers of certain proprietary articles, among them motor cars. Under the bye-laws of the association such articles were not to be sold at prices other than those fixed by the association. If anybody, whether a member or not, sold otherwise than at the fixed prices, the Council of the association was given power to put such person on the “Stop list,” which involved a prohibition of members supplying such a person with proprietary price-maintained goods. The plaintiffs advertised a car, which came within the protected articles, for sale at a higher price. After being heard by the Council, the latter decided to put the plaintiff’s name on to the “Stop list.” The plaintiffs sought an injunction to restrain the defendants from doing so.

Decision

It was held by the **Court of Appeal** that no injunction could be granted, since the publication of the plaintiffs’ name was not unlawful, it having been done by the defendants in the *bona fide* protection of trade interests of their members.

ATKIN, L.J., said, at p. 79:—

“The truth is that the right of the individual to carry on his trade or profession or execute his own activities, whatever they may be, without interruption, so long as he refrains from committing tort or crime, affords an unsatisfactory basis for determining what is actionable, inasmuch as such right is conditioned by precisely similar rights in the rest of his fellowmen. Such co-existing rights do in a world of competition necessarily impinge upon one another, and it appears to me illogical to start with the assumption that an interruption of the power of man to do as he pleases within the law is *prima facie* a legal wrong, which in every case needs to be justified. The true question is, was the power interrupted by an act which the

law deems wrongful? with the practical result that to determine liability one has to concentrate, not upon the effect on the plaintiff, but upon the quality of the act of the defendant. I think that the first contention fails, and that the plaintiffs must succeed, if at all, by showing that the acts done or threatened to be done by the defendants were unlawful.

" I proceed therefore to consider the plaintiffs' claim to succeed by reason of an attempt by the defendants by threats to coerce third parties not to deal with the plaintiffs. It is well known that this branch of the law is made difficult by the omission of lawyers to define their terms. In this case, as in so many others, the whole vocabulary of vague vituperation was invoked—threats, menaces, intimidation, coercion, compulsion, molestation, undue interference. It is as well to bear in mind the facts to which they have to be applied. The association consists of members who are engaged in the production and distribution of motor-cars and their accessories. It is in their opinion in the interests of their trade that their members' goods should be distributed at their members' fixed prices, no more and no less. That this is a lawful object I have no doubt. Manufacturers of goods in the motor trade are by no means the only class who adopt a similar policy. To insure their object they refuse to sell to anyone who refuses to sell at the fixed or list prices. In order to secure that their goods do not come into the hands of a recalcitrant seller, they refuse to sell their goods to anyone who supplies such a seller; and in order that the names of such sellers may be known to those concerned they publish their names in the trade journals in what is called the stop list, which includes an intimation that until further notice those named in the list are not to be supplied with the goods in question. If the object be lawful, I find it difficult to see why any of the above means of carrying out the object should be unlawful. If I were called upon to decide whether the measures taken by the association were reasonable for the desired purpose, I should myself, I think, find them to be both reasonable and indeed necessary, for I do not know how the object could otherwise be obtained. All the intermediate sellers of goods are not members of the association; the trade is of vast dimensions, and intimation in the trade papers would appear to be a usual and reasonable method of conveying information to members of the trade. However, it is sufficient for me that the association and its members consider the course taken to be desirable in their trade interests. . . .

P. 81: "What is meant by coercion? If it means no more than procuring a person to do what he does not want to do, it covers many cases where no causes of action can be suggested to exist. The use of parental rights, the use of rights of property, the deprivation of social advantages, may be so applied as to make it plain to the person affected that he must yield or be ruined. . . . In my opinion the wrongfulness of the inducement cannot depend

upon its weight. Coercion therefore cannot simply mean successful or even inevitably successful inducement. I am satisfied myself that it means nothing at all on a question of tort except in reference to the means employed. . . ."

After discussing the meaning of "Threats" the learned Lord Justice continued:—

"I know of no cases where injury done by threat of a lawful act has been held to be in itself actionable, at the suit either of the person threatened or of the person injured in consequence of the threat. The added element of an intention to injure the plaintiff may make a difference which has to be discussed, but that element is missing in the present case, and would presumably be irrelevant if injury produced by any threat were in itself actionable."

After a full discussion of the cases ATKIN, L.J., laid down at p. 91:—

"It is impossible for the law to prevent all oppressive exercise of legal rights. If rights are used tyrannically or to the public danger, the legislature can control their exercise and impose all necessary checks and safeguards. To enunciate and apply as legal propositions wide prohibitions of misty import may well lead to greater oppression than the evil sought to be repressed."

NOTES

This is a very important case in view of the ever-growing price protection agreements among members of various trades and industries. The proposition contained in the case was, however, challenged soon afterwards in a dramatic manner. In *R. v. Denyer*, [1926] 2 K. B. 258, the secretary of a trade protection association had in circumstances similar to those in *Ware v. De Freville*'s case, written to an offending trader that the association were prepared to desist from putting his name on to the stop list if he paid a certain sum of money. This conduct was held by the Court of Criminal Appeal to amount to demanding money by menaces, and the accused was accordingly convicted under s. 29 (1), of the Larceny Act, 1916.

When the decision in *R. v. Denyer* was reported, other traders, who had made payments in the nature of those in *Denyer's Case*, sued the Motor Trade Association for recovery of that money. This action was dismissed by the Court of Appeal: *Hardie and Lane v. Chiltern*, [1928] 2 K. B. 663. Whether money demanded by a trade association instead of putting the offender's name on to the stop list amounts to demanding money by menaces, depends on the presence of a reasonable and probable cause for such demand. This, in the Court's opinion, is a question for the jury in each case. But the Court held that if the cause of the demand is capable of being associated with the promotion of business interests, and there is evidence that the lawful business interests

have not been exceeded, for instance by demanding an excessive payment, the transaction is lawful. *R. v. Denyer* was disapproved.

The conflict thus existing between the Court of Appeal and the Court of Criminal Appeal was eventually solved by the House of Lords in *Thorne v. Motor Trade Association*, [1937] A. C. 797, [1937] 3 All E. R. 157, in which the opinion of the Court of Appeal in *Hardie and Lane v. Chiltern*, won the day. In this case Lord ATKIN said, at p. 807 :—

“ If the council bona fide exercised this power with the bona fide intention only of carrying out this trade policy, in my opinion they would not be demanding the payment without reasonable and probable cause. It is impossible to assume that the rules must necessarily be abused: and as the powers given can be exercised lawfully, it cannot be said that they are *ultra vires*. . . . It is plain that these rules and any similar rules of any other association in any other trade are capable of being abused: and if so nothing in this decision will prevent offenders from being subject to the criminal law.”

Generally speaking, the decision in cases of this description will depend on whether or not the rules of the association have been abused. Such rules are applied by a committee, and it is well to bear in mind the differences existing between this kind of tribunal and Courts of Law. They have been fully explained by MAUGHAM, J., in *Maclean v. The Workers' Union*, [1929] 1 Ch. 602, at p. 620 :—

“ The jurisdiction of the Courts in regard to domestic tribunals—a phrase which may conveniently be used to include the committees or the councils or the members of trade unions, of members' clubs, and of professional bodies established by statute or Royal Charter while acting in a quasi-judicial capacity—is clearly of a limited nature. . . . Speaking generally, it is useful to bear in mind the very wide differences between the principles applicable to Courts of justice and those applicable to domestic tribunals. In the former the accused is entitled to be tried by the judge according to the evidence legally adduced and has a right to be represented by a skilled legal advocate. All the procedure of a modern trial, including the examination and cross-examination of the witnesses and the summing up, if any, is based on these two circumstances. A domestic tribunal is in general a tribunal composed of laymen. It has no power to administer an oath and, a circumstance which is perhaps of greater importance, no party has the power to compel the attendance of witnesses. It is not bound by the rules of evidence; it is indeed probably ignorant of them. It may act, and it sometimes must act, on mere hearsay, and in many cases the members present or some of them (like an English jury in ancient days) are themselves both the witnesses and the judges. Before such a tribunal counsel have no right of audience and there are no effective means for testing by cross-examination the truth of the

statements that may be made. The members of the tribunal may have been discussing the matter for weeks with persons not present at the hearings, and there is no one even to warn them of the danger of acting on preconceived views."

It was held that the Courts have no jurisdiction to interfere with decisions arrived at by those tribunals if they were made honestly and in good faith according to the rules of the association, even though the rules themselves may be unfair and unjust.

Though this case dealt only with decisions by domestic tribunals regarding members of the association, its gist is applicable also to cases like those discussed above.

This matter should also be studied in relation to contracts in restraint of trade, see *supra*, p. 31. As to the effect of acts of trade associations on contracts to which they are not parties, see the notes to *Lumley v. Gye*, *supra*, p. 48.

ASSIGNMENT OF CONTRACT

WILLIAM BRANDT'S SONS & CO. v. DUNLOP RUBBER CO., LTD.,

[1905] A. C. 454

The assignment of contractual rights in equity.

Facts of the Case

Kramrisch & Co., who were rubber merchants in Liverpool, were financed by Brandt's, who were London bankers. When K. & Co. made a purchase, Brandt's provided the necessary funds, and by way of security they took delivery of the goods. When the goods were sold, they were released by Brandt's, who received the purchase money direct from the purchasers. K. & Co. had also a similar arrangement with another firm of bankers.

K. & Co. sold a quantity of rubber to the Dunlop Company and sent with the goods an invoice, on which was stamped a note requesting that the amount of the invoice should be remitted to Brandt's. There was a mistake of a few shillings in the figures and the invoice was returned for correction. The corrected invoice did not bear the stamped direction for remittance to Brandt's.

There was also sent to the Dunlop Company a letter signed by K. & Co. requesting the Dunlop Company to sign another letter, enclosed, promising to remit the price of the goods in question to

Brandt's. This letter was signed on behalf of the Dunlop Company and returned by them to Brandt's accordingly.

The correspondence had been conducted throughout by the Dunlop Company's Birmingham office, but all cheques were issued from London. The clerk at the Birmingham office only sent to London the corrected invoice, which had omitted the direction as to payment to Brandt's. Consequently the London office of the Dunlop Company, instead of sending the cheque to Brandt's, sent it, in compliance with a previous general order from K. & Co., to the second firm of bankers who in fact had had nothing to do with this particular transaction. When Brandt's wrote to the Dunlop Company, pressing for a remittance, they were informed that the amount had been so paid.

Brandt's then brought this action against the Dunlop Company to recover the amount from them, claiming that the money in question had been assigned to them and that the Dunlop Company had notice of this.

Decision

It was held by the **House of Lords** that there was evidence of an equitable assignment of the debt, with notice to the Dunlop Company, and that Brandt's could therefore recover the amount from the Dunlop Company.

Lord MACNAGHTEN said:—

"An equitable assignment . . . may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice he does so at his peril. If the assignment be for valuable consideration, and communicated to the third person, it cannot be revoked by the creditor, or safely disregarded by the debtor."

NOTES

Section 136 of the Law of Property Act, 1925 (replacing the former provision of section 25 (6) of the Judicature Act, 1873), provides that an assignment of a debt or other legal thing in action must be absolute (and not by way of charge only), and in writing signed by the assignor, and that written notice must be given to the debtor or other person liable. If those provisions are satisfied the assignment operates as a legal assignment subject to any equities having priority over the assignee. But if these provisions are not complied with, there may still be a good

equitable assignment, if the requirements laid down by Lord MACNAGHTEN in the above case are satisfied. As a rule in the case of an equitable assignment the assignee cannot sue in his own name but must also join the assignor as a party to the action. The above case was exceptional in that Brandt's were allowed to sue in their own name, although the assignment was only an equitable one. As to the law generally, see Stevens' Elements of Mercantile Law, 10th Edn., p. 58.

TOLHURST v. THE ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900) LTD. AND THE IMPERIAL PORTLAND CEMENT CO., LTD.,

[1903] A. C. 414

Where a contract does not involve any element of personal skill or confidence, the benefit of the contract can be assigned.

Facts of the Case

Tolhurst was the owner of certain chalk quarries at Northfleet, and the Imperial Company acquired land near the quarries and erected cement works. In January, 1898, Tolhurst made a contract with the Imperial Company by which it was provided that on completion of a certain tramway leading to the company's works, Tolhurst would, for a term of 50 years, or for such shorter period (not being less than 35 years) as he had chalk available and suitable for the manufacture of Portland cement, supply to the company, and the company would take and buy from him, at least 750 tons per week and so much more, if any, as the company should require for the manufacture of Portland cement upon their said land, at an agreed price per ton, and the average monthly payment for any year after 1898 was to be not less than £188.

In 1900 the Imperial Company sold its undertaking and the land and works at Northfleet to the Associated Company and gave Tolhurst notice thereof. The Imperial Company went into voluntary liquidation, its affairs being wound up and its assets distributed. Tolhurst made no claim in the liquidation.

Tolhurst now contended that by parting with its undertaking and going into liquidation the Imperial Company had put an end to the contract made in January, 1898, and that he was not bound to furnish the Associated Company with the supplies provided for by that contract.

Decision

On appeal to the **House of Lords** it was held that the contract made by Tolhurst with the Imperial Company was assignable, and that Tolhurst was bound to supply the Associated Company with chalk at the Northfleet works in accordance with the provisions of the contract.

Lord MACNAGHTEN said :—

“ There are contracts of course which are not to be performed vicariously, to use an expression of KNIGHT BRUCE, L.J. There may be an element of skill or an element of personal confidence to which, for the purposes of the contract, a stranger cannot make any pretensions. But no one, I suppose, would seriously argue that a contract for delivery of chalk from particular quarries for the use of particular cement works cannot be performed by any person for the time being possessed of the quarries, or that it can make the slightest difference to anybody who the proprietors of the cement works or the actual manufacturers may be, provided they are in a position to carry out the terms of the original contract.”

And Lord LINDLEY said :—

“ If the above agreement had been with an ordinary individual, his interest would, on his death, have passed to his executors or administrators ; or if he had become bankrupt, his trustees could have claimed it and have sold it for the benefit of his creditors. It follows that on the same supposition he could have assigned such interest in his lifetime. The Imperial Company could, in my opinion, have done the same thing ; they could have assigned their interest themselves, before winding-up proceedings commenced, and their liquidators could have assigned it as part of their assets afterwards. But it is necessary to look a little further and see what limit is set to the right conferred by the agreement . . . I do not think their right to have chalk from Tolhurst’s quarries could be assigned apart from their own land and cement works. The Imperial Company could not by alienation or otherwise increase the burdens which Mr. Tolhurst undertook to bear. But this is the only limit which I can find in the present case.”

NOTES

As shown by the judgment of Lord MACNAGHTEN, where a contract involves an element of skill, or personal confidence, the benefit of such a contract cannot be assigned, as for instance in the case of an agreement to perform services of a private or professional nature.

And in the case of *Kemp v. Baerselman*, [1906] 2 K. B. 604, where Baerselman contracted with Kemp, a cake manufacturer, to supply him with all the eggs of a particular kind or quality which he required

for manufacturing purposes for one year, and K. on his part agreed not to purchase eggs from any other merchant during that year, so long as K. was ready to supply them, and then (during the year) K. transferred his business to a company and gave notice thereof to B.; it was held by the Court of Appeal, that, looking at the contract as a whole, and especially the stipulation by K. not to purchase his eggs elsewhere (which would not be binding on the company as they were not parties to the contract with B.), the contract was made by B. with K. personally, and was not assignable, and therefore B. was not bound to continue to supply eggs, under that contract, to the company for the remainder of the year.

REMISSION OF MONEY BY POST

MITCHELL-HENRY v. NORWICH UNION LIFE INSURANCE SOCIETY, LTD.,

[1918] 2 K. B. 67

Remittance by post does not constitute payment unless made in the ordinary way in which money is remitted by post.

Facts of the Case

The defendants' secretary sent a letter to the plaintiff stating that a sum of £48 5s. 8d. would become due for payment to the defendants on a certain date, and the letter continued as follows:—

“ I shall be obliged by your paying the amount as stated below on that day to our office at 13, Southampton Street, Holborn.”

And added:—

“ Please return this notice when remitting.”

The plaintiff sent by registered post £48 in Treasury notes, and a postal order and stamps for 5s. 8d.

This registered letter was delivered by the postman to a liftboy employed in the building in which the defendants' office was situated, but he was not employed by the defendants. The boy did not deliver the letter to the defendants and stole the money.

The plaintiff claimed a declaration that he had paid the amount.

Decision

The **Court of Appeal** held that although by the use of the word “ remitting ” in their original letter, the defendants had impliedly

authorised the plaintiff to send the money through the post in the ordinary way in which money was remitted by post, yet that it was not usual to send so much as £48 by post in Treasury notes, and therefore the plaintiff could not be said to have paid his debt.

WARRINGTON, L.J., said:—

“The defendants requested the plaintiff to send this sum of £48 5s. 8d. by post, but that did not amount to a request to send that sum by post in any form which the plaintiff might choose; it only amounted to a request to send that sum by post in such an ordinary way as was appropriate to a sum of that amount . . . I am not prepared to say that no sum may properly be sent by registered post in Treasury notes under such a request as this, but in my opinion the plaintiff has failed to make out that the ordinary way of sending so large a sum as £48 is to send it in £1 Treasury notes.”

NOTES

In *Pennington v. Crossley & Son* (1897), 77 L. T. 43, the defendants had been in the habit for many years of settling the plaintiff's accounts by cheques through the post and the plaintiff had never objected to this mode of payment, but when a cheque for an account sent in the same way was stolen in the course of post, and never reached the plaintiff, it was held by the Court of Appeal that the practice followed by the parties could not be construed as being a request by the plaintiff to remit in this way, and the plea of payment by the defendants failed, and they were still liable to the plaintiff for the account in question. See Stevens' Elements of Mercantile Law, 10th Edn., p. 66.

APPROPRIATION OF PAYMENTS

DEVAYNES v. NOBLE, CLAYTON'S CASE

(1816), 1 Mer. 529, 572

In the case of an account current, in the absence of any express declaration, payments made are presumed to have been appropriated to the debit items in order of date.

Facts of the Case

Devaynes was the senior partner in a firm of bankers, of whom Clayton was a client. When Devaynes died, Clayton continued to

do business with the firm, but later the firm went bankrupt. After the bankruptcy, numerous questions of law arose which were argued in Chancery, but only one is now material. This is the claim brought by Clayton against Devaynes's private estate for the amount owing to him by the firm at the time of Devaynes's death. The amounts which Clayton had since received from the firm were more than sufficient to satisfy the balance due at the time of Devaynes's death, but it was argued that these amounts could be appropriated by Clayton to the subsequent moneys paid in by him to his account at the bank, leaving the earlier items still unpaid.

Decision

Sir WILLIAM GRANT, M.R., discussed the manner in which payments on account should be applied, and said that in the first place the debtor might at the time of payment exercise his option as to how the payment was to be applied, and if the debtor did not elect, the creditor had the option of doing so at any time subsequently, but that in the case of an account current such as a banking account, where there was a continuation of dealings, then in the absence of an express declaration, at the time of payment, there was a presumption that the payments made were appropriated to the various debit items in order of date.

In the course of his judgment, he said :—

“ This is the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying, this draft is to be placed to the account of the £500 paid in on Monday, and this other to the account of the £500 paid in on Tuesday. There is a fund of £1,000 to draw upon, and that is enough. In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably it is the sum first paid in, that is first drawn out. It is the first item on the debit side of the account that is discharged, or reduced, by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled and particularly cash accounts . . . You are not to take the account backwards and strike the balance at the head, instead of the foot, of it.”

NOTES

In the case of *Cory Bros. & Co. v. Mecca, Turkish S.S. (Owners) The Mecca*, [1897] A. C. 286, the House of Lords held that the rule in Clayton's case did not apply when there was not an account

current between the parties but a number of separate transactions, nor where from an account rendered or other circumstances it appeared that the creditor intended to reserve the right of appropriation ; and they also held that whereas an appropriation by a debtor must be made at the time of payment, the creditor's right of making an appropriation (so long as he had not made his election), might be exercised " up to the very last moment " and might be declared by the creditor bringing an action or in any other way which made his intention clear.

A trustee who has mixed trust moneys with his own by paying them all in to the same bank account, cannot rely on the rule in *Clayton's Case* as against the beneficiaries. In such a case it will be presumed that the moneys first drawn out by him from the bank account were his own moneys, so as to leave the remaining balance (if any) available for the beneficiaries. (See *Re Hallett, Knatchbull v. Hallett* (1880), 13 Ch. D. 696.) But the rule will apply, as between two different beneficiaries, whose moneys have both been paid by the trustee into the same bank account, when the trustee has afterwards drawn out part of such trust moneys. (See *Re Stenning, Wood v. Stenning*, [1895] 2 Ch. 433; and *Re Hallett*, above.)

In modern times, when banking is carried on by few large companies, the rule in *Clayton's Case* is no longer as important as it was when the large number of private partnerships was engaged in this business. The most important modern application of the rule happens when a secured overdraft or loan is extinguished by payments in. The rule may then operate so as to leave subsequent drawings unsecured. This was well illustrated in *Deeley v. Lloyds Bank, Ltd.*, [1912] A. C. 756. In 1893, one G. secured an overdraft for £2,500 on his account with the defendant bank by means of a mortgage. Two years later, in 1895, he made a second mortgage of the same property to the plaintiff who had given him a loan. The defendant had notice of this. G. made various payments, amounting by 1896 to £2,500, into the account. At the same time he drew on his account but so that his overdraft never exceeded £2,500. Later the bank realised the security and G. became bankrupt. Then the plaintiff sued the bank to account to her for the proceeds of the first mortgage. She based her claim on the rule in *Clayton's Case*, and contended that she had, by the operation of the rule, become entitled to the mortgage. The House of Lords decided that the defendant was liable. *Clayton's Case* applied. The original loan of £2,500 had been extinguished in 1896 so that the first mortgage no longer attached and the plaintiff's second mortgage had moved up. When therefore the bank made subsequent advances these ranked after the plaintiff's second mortgage. Had the bank, on receiving notice of the second mortgage, insisted that all payments in by G. should be made on a new account, their first mortgage would have been preserved. To proceed in this manner is provided for in all bank regulations, and in the instant case the bank manager had inadvertently neglected to do so. *Deeley v. Lloyds Bank* also applies to cases where overdrafts have been secured by guarantees.

EFFECT OF BREACH OF CONTRACT

THE MERSEY STEEL AND IRON CO., LTD. v. NAYLOR, BENZON & CO.

(1884), 9 App. Cas. 434

The circumstances in which the breach of part of a contract amounts to a repudiation, and the effects thereof.

Facts of the Case

N. B. & Co. bought from the appellant company 5,000 tons of steel, to be delivered 1,000 tons monthly, payment to be made within three days after receipt of the shipping documents. Shortly before payment for the first instalment became due, a petition was presented to wind up the appellant company, N. B. & Co. believing, on the erroneous advice of their solicitor, that they could not, without leave of the Court, safely pay for the steel already delivered, pending the petition, objected to make the payments due from them unless the company obtained the sanction of the Court.

The company then wrote that they should consider the refusal to pay as a breach of contract, releasing them from any further obligations. A few days later an order was made by the Court to wind up the company. When the company was being wound up, the liquidator took up the same attitude, and refused to make any further deliveries under the contract.

Decision

The **House of Lords** discussed the circumstances in which a party to a contract was discharged from further performance by a breach of part of the contract, and it was held that, in this case, payment for a previous delivery was not a condition precedent to the right to claim the next delivery; and that by postponing payment under erroneous advice, N. B. & Co. had not acted so as to shew an intention to repudiate the contract, or so as to release the company from further performance of the contract, and therefore N. B. & Co. were entitled to recover damages against the appellant company for breach of contract.

The Earl of SELBORNE, L.C., said:—

“ I am content to take the rule as stated by Lord COLERIDGE, in *Freeth v. Burr*, which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see

whether the one party to the contract is relieved from its future performance by the conduct of the other ; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part."

And Lord BLACKBURN said :—

" If you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say ' I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct ' . . . I quite agree that when there were a certain number of tons of the article delivered, it was a material part of the contract that the man was to pay, but it was not a part of the contract that went to the root of the consideration in the matter."

NOTES

It is a question of fact in each case, whether the failure by one party to perform part of his agreement, releases the other party altogether from his side of the agreement or not, and the guiding principles to be applied to the particular facts are those laid down by the Earl of SELBORNE and Lord BLACKBURN.

But where there is a breach of some condition of the contract this will amount to repudiation, and discharge the party from his obligation. See *Behn v. Burness*, discussed below, and the sections of the Sale of Goods Act, 1893, establishing conditions on the sale of goods as well as *Frost v. Aylesbury Dairy Co.*, set out *infra*, p. 179.

CONDITION AND WARRANTY

(1) BEHN v. BURNESS

(1863), 3 B. & S. 751

(2) DE LASSALLE v. GUILDFORD,

[1901] 2 K. B. 215

A condition is a term of the contract going to its root ; breach of it discharges the contract. A warranty is

a collateral term of the contract ; breach of it leaves the contract binding, but gives the aggrieved party an action for damages.

Facts of the First Case

By a charter party it was agreed that "the good ship or vessel called the M., of 420 tons or thereabouts, now in the port of Amsterdam" should "with all possible despatch proceed direct to Newport" to load a cargo. In fact the ship was not in the port of Amsterdam when the contract was made, and when the ship arrived at Newport the charterer refused to load. The owner thereupon sued him for damages.

The question to be determined by the Court was whether the words "now in the port of Amsterdam" amounted to a condition the breach of which entitled the charterer to repudiate the contract, or whether they were only in the nature of a warranty, in which circumstances the charterer would still be bound, that is to say, would have to load, but would be entitled to claim damages for delay if he had sustained any.

Decision in the First Case

The Court of **Exchequer Chamber** held that the words amounted to a condition, and that the charterer was right when he refused to load the ship at Newport.

WILLIAMS, J., said, at p. 753 :—

"Properly speaking, a representation is a statement, or assertion, made by one party to the other, before or at the time of the contract of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract ; and, consequently the contract is not broken though the representation proves to be untrue."

After explaining that a descriptive statement may be either a mere representation or a "substantive part of the contract," and that it is a question of fact in each case to which of the two the statement amounts, the learned judge continued, at p. 754 :—

"If the Court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract, and not a mere representation, the often discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for compensation in damages."

p. 757. "The Court must be influenced in the construction, not only by the language of the instrument, but also by the circumstances under which and the purposes for which, the charter party was entered into."

p. 759. "The place of the ship at the date of the contract, where the ship is in foreign ports and is chartered to come to England, may be the only datum on which the charterer can found his calculations of the time of the ship's arriving at the port of loading. A statement is more or less important in proportion as the object of the contract more or less depends upon it. For most charters . . . the time of a ship's arrival to load is an essential fact, for the interest of the charterer. In the ordinary course of charters in general it would be so: the evidence for the defendant shows it to be actually so in this case. Then, if the statement of the place of the ship is a substantive part of the contract, it seems to us that we ought to hold it to be a condition upon the principles above explained."

Facts of the Second Case

The defendant let his house to the plaintiff. The latter signed his counterpart of the lease, but refused to hand it over unless he received an assurance that the drains were in order. The defendant verbally gave the assurance, whereupon the plaintiff handed him his signed counterpart. In fact the drains were not in order, and the plaintiff sued for damages.

Decision in the Second Case

The Court of Appeal held that the defendant was liable. His verbal representation was a collateral promise in the nature of a warranty.

A. L. SMITH, M.R., said, at p. 221:—

"Now, what constitutes a warranty in law, or a mere representation? To create a warranty no special form of words is necessary. It must be a collateral undertaking forming part of the contract by agreement of the parties express or implied, and must be given during the course of the dealing which leads to the bargain, and should then enter into the bargain as part of it. . . . A decisive fact is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case it is a warranty, in the latter not," but merely a representation. In the present case the lessor asserted a fact, namely that the drains were intact, of which the lessee was ignorant; he did not give a judgment or state an opinion.

NOTES

The word warranty has only acquired its present meaning in comparatively modern times. A century ago it had a much wider significance, and was used to describe what would now be called a condition, as well as in its present sense. It is obviously very necessary to have different words to describe these different conceptions, but in some branches of business the use of the term warranty to describe certain fundamental terms in contracts has become inveterate and it is considered impossible to effect a change. This is so in insurance and carriage by sea where for example warranties of seaworthiness are in reality conditions. Students must be on their guard in respect of these differing meanings of the term. The modern meaning is defined in s. 62, of the Sale of Goods Act, 1893 :—“‘Warranty’ as regards England and Ireland means an agreement . . . collateral to the main purpose of (the) contract, the breach of which gives rise to a claim for damages, but not to . . . treat the contract as repudiated.”

Another distinction to be made is between a representation on the one hand and a term of the contract, whether condition or warranty, on the other. During negotiations for an agreement one party frequently makes statements which influence the other to clinch the bargain. When later these statements turn out to be false, the question arises whether they have remained representations, or whether they have become terms of the contract. The remedies of the injured party differ in either case; an action for damages will lie on a false representation only when it is fraudulent (see *Derry v. Peck*, and *Redgrave v. Hurd*, illustrated *infra* p. 93) while if there is a breach of a condition or of a warranty there will always be an action for breach of contract (see *Behn v. Burness* and *De Lassalle v. Guildford, supra*). It is not always easy to determine the nature of such statements, but the tendency of the Courts seems to be to treat them as representations unless clear evidence is forthcoming that the parties intended them to become terms of the contract. This is well illustrated by the case of *Heilbut, Symons & Co. v. Buckleton*, [1913] A. C. 30. In that case a sale of shares in a rubber company was negotiated, and during the negotiations the sellers made representations which subsequently were found to be false, and the buyers of the shares suffered heavy damage by reason of the fall in value of the shares. In an action for damages it was however held that the statements were mere representations, and not warranties. Since therefore, as the jury found, they had been made innocently, the action was dismissed. The law was laid down in the House of Lords by Lord MOULTON :—

“Nor is there any controversy as to the legal nature of that which the plaintiff must establish. He must show a warranty: *i.e.*, a contract collateral to the main contract to take the shares, whereby the defendants in consideration of the plaintiff taking the shares promised that the company itself was a rubber company. The question in issue is whether there was any evidence that such a

contract was made between the parties. . . . In respect of the question of the existence of a warranty the Courts have had the advantage of an admirable enunciation of the true principle of law which was made in very early days by HOLT, C.J., with respect to the contract of sale. He says: 'An affirmation at the time of the sale is a warranty, provided it appears on evidence to be so intended.'

And later, Lord MOULTON said:—

"It is, my Lords, of the greatest importance, in my opinion, that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made. In the present case the statement was made in answer to an inquiry for information. There is nothing which can by any possibility be taken as evidence of an intention on the part of either or both of the parties that there should be a contractual liability in respect of the accuracy of the statement."

The question whether a statement remains a mere representation or becomes a term of the contract, may also be important, when the contract contains a clause providing for disputes to be referred to arbitration. If a false representation is made, which gives the aggrieved party a right to avoid the contract, and the contract is so avoided before execution then the arbitrator does not get jurisdiction in the matter (see *Pennsylvania Shipping Co. v. Compagnie Nationale de Navigation*, [1936] 2 All E. R. 1167).

HOCHSTER v. DE LA TOUR
(1853), 2 E. & B. 678

An action may be brought on an anticipatory breach of contract.

Facts of the Case

On April 12th, 1852, the defendant, who planned to go on a tour of Europe on June 1st, engaged the plaintiff as a courier, and agreed to pay him £10 per month from that day. On May 11th the defendant wrote to the plaintiff that he had changed his plans, and did not require his services. He refused to make him any compensation.

The plaintiff commenced his action on May 22nd. A few days later he obtained another engagement, on equally good terms, but not commencing until July 4th.

It was contended for the defendant that there could not be a breach of the contract before June 1st, and that the defendant's letter was only an offer to rescind, which was accepted by the plaintiff when he accepted other employment.

Decision

The **Court of Queen's Bench** held that the plaintiff was entitled to damages against the defendant, and Lord CAMPBELL, C.J., said that when a contract had been repudiated by one party it was not necessary for the other party to keep himself still open to perform it, or to abstain from making other arrangements until the day fixed for performance had passed ; nor was it always necessary to wait until the time for performing the contract arrived before suing upon it.

He said :—

" If a man promises to marry a woman on a future day, and before that day he marries another woman, he is instantly liable to an action for breach of promise of marriage (*Short v. Stone* (1846), 8 Q. B. 358). If a man contracts to execute a lease on and from a future day for a certain term, and before that day executes a lease to another for the same term, he may be immediately sued for breaking the contract (*Ford v. Tiley* (1827), 6 B. & C. 325). So, if a man contracts to sell and deliver specific goods on a future day, and before that day he sells and delivers them to another, he is immediately liable to an action (*Bowdell v. Parsons* (1808), 10 East 359) . . . In this very case, of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other ; and it seems to be a breach of an implied contract if either of them renounces the engagement."

NOTES

In *Johnstone v. Milling* (1886), 16 Q. B. D. 460, Johnstone granted a lease of property to Milling for 21 years, determinable by M. at the end of 4 years on his giving 6 months' notice and J. covenanted to rebuild the property after the first 4 years upon 6 months' notice from M. to do so. Several times during the 4 years J. told M. he would be unable to get the money to rebuild. In consequence of this M. gave 6 months' notice to terminate the lease at the end of the 4 years. On the expiration of the 4 years M. stayed on for some months, on the chance, as he said, of J. getting the money to rebuild. J. was, however, unable to rebuild, and M. now sued him for damages for breach of contract. It was held that the covenant to rebuild had not been broken, because M. himself had determined the lease before the time for performance of that covenant, and that what J. had said to M. about being unable to get the money for rebuilding did not amount to a repudiation in advance of the covenant to rebuild, and even if it had done, M. had not elected to treat it as such, but had given notice himself to end the lease, and therefore M. had no claim against J.

A renunciation or repudiation of a contract by one party during the actual performance of the contract will also release the other party

from the contract and from performing his side of it. Thus in *General Billposting Co. v. Atkinson*, [1909] A. C. 118, the respondent had been engaged by the appellants for a certain period subject to 12 months' notice. It was agreed that he should be restricted in his trade after termination of the contract. The appellant wrongfully dismissed the respondent without notice, and it was held that he was no longer bound by the covenant in restraint of trade.

This problem is of commercial importance, for instance, in instalment contracts, where the seller refuses after a time to deliver further instalments. These cases are decided on their facts, but Lord WRIGHT has given this guidance in *T. D. Bailey, Son & Co. v. Ross T. Smyth & Co.* (1940), 56 T. L. R. 825:

"It must always be a question in such cases whether a refusal by word or conduct or failure to deliver more than certain instalments or quantities, and not the whole quantity, goes to the roots of the contract so as to constitute a total repudiation."

The judgment from which these words are quoted is a strong warning that facts should be carefully examined before deciding that the parties have repudiated the whole contract. See Stevens' Elements of Mercantile Law, 10th Edn., p. 87.

QUANTUM MERUIT

VIGERS v. COOK,
[1919] 2 K. B. 475

A plaintiff cannot succeed on a quantum meruit when an essential term of an entire contract is not carried out.

Facts of the Case

The facts in this case are of an unpleasant nature but they illustrate an important point. The defendant, whose son had died in a military hospital in London on July 31st, 1918, gave a verbal order to the plaintiff, an undertaker, for the funeral. The body was to be taken to a mortuary in Pimlico, and on the day of the funeral, which was fixed for August 3rd, it was to be taken into a Church in Richmond, where the funeral service was to be read, and then placed on a gun-carriage and handed over to the military for the remainder of the funeral. The plaintiff gave an estimate of the cost at £49 exclusive of the charge for carriages.

When the plaintiff took the body from the hospital, it was in an advanced state of decomposition. He placed it in a lead coffin, leaving a pin-hole for the escape of gases, and took it to the mortuary, to await the funeral. On August 2nd, the mortuary authorities complained of an offensive smell from the coffin, so the plaintiff

sent a man to stop up the pin-hole, knowing when he did so that there would then be a danger of the coffin bursting.

When, on the next day, the body was taken to Richmond for the funeral, it was found that the coffin was leaking owing to the lead having burst, in consequence of the closing of the pin-hole, and the smell was so offensive that it was impossible to take the coffin into the church, and the service had to be read without it.

In consequence of what had happened the defendant refused to pay the plaintiff's bill and the plaintiff sued him. The County Court Judge allowed the reduced sum of £42 as upon a *quantum meruit*.

Decision

The **Court of Appeal** dismissed the claim. It was held that the contract was one entire contract ; that it was an essential term that the coffin should be taken into the church for a part of the service, subject to the condition that the body was in such a state as to permit of this being done ; that the onus lay on the plaintiff to prove that it was not owing to his default that this term of the contract could not be carried out, and he had not discharged that onus ; and that he was, therefore, not entitled to recover anything.

BANKS, L.J., said :—

"In my opinion the contract which was made between the parties included, as I have said, as an essential term, the conveying of the body into the church for a part of the service, subject to this condition, that the body was in such a state as to permit of this being done. The body in this coffin was not in that state, but the onus was on the plaintiff to establish that it was not in that state owing to no default on his part. In my opinion he did not discharge that onus . . . he has not shown that it was owing to no fault on his part that one essential term of his contract was not fulfilled ; and it being one entire contract, in my opinion he fails in proving that he is entitled to any portion of the one entire price which was payable for the entire contract."

NOTES

This case follows the rule in *Sumpter v. Hedges*, [1898] 1 Q. B. 673, where a builder who had contracted to erect certain buildings for a lump sum, and abandoned the contract after he had done part of the work, failed to recover on a *quantum meruit*, although the other party had taken advantage of his work and completed the buildings.

On the other hand, if the non-fulfilment of the contract by one party is due to the fault of the other party, then the former can sue on a *quantum meruit* to recover the value of the work partly performed by him under the contract. (See per BEST, C.J., in *Mavor v. Pyne* (1825), 3 Bing. 285, at p. 288.)

And where a builder has agreed to erect or repair a house under a lump sum contract, but has departed from the terms of his agreement or not carried it out entirely, he is still entitled to recover the contract price, subject to a deduction for defective work and work not finished, unless (a) the work which he has done has been of no benefit to the owner; or (b) the work is entirely different from that which he contracted to do; or (c) he has abandoned the work and left it unfinished. (See *Dakin & Co., Ltd. v. Lee*, [1916] 1 K. B. 566, per SANKEY, J., at p. 574.)

The case of *Dakin & Co., Ltd. v. Lee* was distinguished in the later case of *Eshelby v. Federated European Bank, Ltd.*, [1932] 1 K. B. 423, where the defendants guaranteed payment of an account for repairs and decorations to be done by the plaintiff (under an estimate of £1,500), "subject to the said works being duly executed in accordance with the agreement." It was found that the work was not finished and a sum of £80 would have to be spent to finish it, and it was held that the plaintiff could not recover anything from the defendants, because (*inter alia*) the work had not been "duly executed."

The legal basis of a *quantum meruit* claim has sometimes been regarded as an implied contract to pay. It is clear, however, that the obligation to pay a *quantum meruit* is one which the law imposes in a proper case. In *Craven-Ellis v. Canons, Ltd.*, [1936] 2 K.B. 403, a director had entered into a service agreement with a limited company. The articles of association of the company provided that directors must take up qualification shares within two months after their appointment. This the director failed to do, but he nevertheless did work under the agreement. He later sued for remuneration, and it was held that though the contract was void he was entitled to recover on a *quantum meruit*. GREENE, L.J., in the Court of Appeal, laid down that the obligation to pay a reasonable remuneration, that is not necessarily that agreed in the void contract, for work done or goods supplied, when there was no binding contract between the parties, was imposed by law and not by an inference of fact from the acceptance of the goods or services.

PENALTY AND LIQUIDATED DAMAGES

DUNLOP PNEUMATIC TYRE CO., LTD. v. NEW GARAGE AND MOTOR CO., LTD.,

[1915] A. C. 79

The distinction between a penalty and liquidated damages.

Facts of the Case

In October, 1910, the Dunlop Company entered into a contract with A. Pellatt Ltd. to supply A. P. Ltd. with motor tyres, covers,

and tubes, and to allow them certain discounts off the list prices, and A. P. Ltd. agreed not to sell to private customers at less than list prices, or to trade customers at less than list prices after deducting certain discounts, and they further agreed, as agents of the Dunlop Company, to obtain from trade customers similar undertakings to observe the Dunlop Company's list prices.

In April, 1911, the respondents (the New Garage and Motor Co., Ltd.) applied to A. P. Ltd. for a supply of Dunlop goods, but before supplying them, A. P. Ltd., in pursuance of their contract with the Dunlop Company, required the respondents to sign an agreement in the form of a letter from the respondents to A. P. Ltd., acting as agents for the Dunlop Company. By such agreement, in consideration of certain trade discounts, the respondents agreed :—

1. Not to remove, alter or tamper with any of the manufacturers' marks or numbers.
2. Not to sell below list prices.
3. Not to supply persons whose supplies the Dunlop Company had decided to suspend.
4. Not to export tyres or tubes without permission of the Dunlop Company.
5. "To pay to the Dunlop Company the sum of £5 for each and every tyre, cover, or tube sold or offered in breach of this agreement, as and by way of liquidated damages and not as a penalty."

In May, 1911, the respondents broke this agreement by selling a tyre cover below the list price. The Dunlop Company then sued the respondents for an injunction and damages, and the main point to be decided was whether the sum mentioned in clause 5 of the agreement was liquidated damages or a penalty.

Decision

The **House of Lords** held that the sum mentioned was liquidated damages. The following extracts from the judgment of Lord DUNEDIN form a clear statement of the law :—

"1. Though the parties to a contract who use the words 'penalty' or 'liquidated damages' may *prima facie* be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages.

"2. The essence of a penalty is a payment of money stipulated as in *terram* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (*Clydebank Engineering and Shipbuilding Co. v. Yzquierdo y Castaneda Don Jose Ramos*, [1905] A. C. 6).

" 3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged at the time of making the contract, not as at the time of the breach (*Public Works Commissioner v. Hills*, [1906] A. C. 368; and *Webster v. Bosanquet*, [1912] A. C. 394).

" 4. To assist this task of construction various tests have been suggested, which, if applicable to the case under consideration, may prove helpful or even conclusive. Such are :

" (a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustrations given by Lord HALSBURY in *Clydebank Case*, [1905] A. C. 6.)

" (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid. (*Kemble v. Farren* (1829), 6 Bing. 141.)

" (c) There is a presumption (but no more) that it is a penalty when ' a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.' (Lord WATSON in *Lord Elphinstone v. Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332.)

" On the other hand :

" (d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties. (*Clydebank Case*, [1905] A. C. 6, Lord HALSBURY at p. 11; *Webster v. Bosanquet*, [1912] A. C. 394, Lord MERSEY at p. 398.)"

NOTES

The authorities cited by Lord DUNEDIN should be observed.

It will be noted that though the language used by the parties themselves in describing a sum made payable on breach of contract (whether it be called a " penalty " or " liquidated damages ") is a guide to the Court in deciding the matter, yet such language is not conclusive. Thus, in *Kemble v. Farren* (1829), 6 Bing. 141, the defendant agreed to act as principal comedian at Covent Garden Theatre for four seasons, on certain terms, and the parties agreed that on breach of any of the stipulations in the contract the sum of £1,000 should be payable by the party breaking the contract, which sum they declared was to be " liquidated and ascertained damages, and not a penalty or penal sum or in the nature thereof." The defendant refused to act during the second season, and at the trial the jury awarded the plaintiff £750

damages, but he claimed £1,000 as liquidated damages under the agreement. The Court, however, came to the conclusion that, having regard to the fact that the contract contained a number of stipulations of varying degrees of importance, the sum of £1,000 was not really intended by the parties to be recoverable in any event as liquidated damages, for any breach whatever, but was intended to be a penalty, and that accordingly the plaintiff could only recover the actual amount of damages awarded by the jury, namely £750.

On the other hand, *Elphinstone (Lord) v. The Monkland Iron and Coal Co., Ltd.* (1886), 11 App. Cas. 332, was a case in which the parties to a lease had fixed a sum of £100 per acre as being payable for all land not restored to its proper state, and that sum was described in one part of their agreement as "the penalty therein stipulated." It was, however, held by the House of Lords on the facts of the case that such sum was liquidated damages, and not a penalty.

A new point arose in *Cellulose Acetate Silk Co., Ltd. v. Widnes Foundry* (1925), Ltd., [1933] A. C. 20. There contractors had agreed to pay a penalty of £20 for every week that they were in default with completing the erection of a plant. They were thirty weeks late, whereupon the owners of the plant claimed £5,850 actual damages. In doing so they contended that the penalty clause in the agreement was void; the sum of £20 was not a "genuine pre-estimate of the damage," *supra*, since it was much too low. It was held in the House of Lords that the so-called "penalty" was neither a penalty nor liquidated damages, in the one case because it was not *in terrorem*, in the other, because it did not constitute a genuine pre-estimate of the damage. What the clause amounted to was simply a limitation of liability on the part of the contractors, by which the owners were bound, and they could not claim more than £600 in all.

FOAKES v. BEER

(1884), 9 App. Cas. 605

An agreement to discharge a person from a liability is not binding without consideration.

The facts and decision in this case will be found on page 29 and should be referred to there. In the case of an executory contract agreement to rescind is effective because each side gives up the right to performance by the other, thereby providing consideration. But if one party has completed performance an agreement to rescind is inoperative because there is no consideration. See Stevens' Elements of Mercantile Law, 10th Edn., p. 20.

DAMAGES FOR BREACH OF CONTRACT

HADLEY v. BAXENDALE

(1854), 9 Ex. 341

On a breach of contract, the damages recoverable are those which may fairly and reasonably be considered as arising naturally, that is, according to the ordinary course of things, from the breach, or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of a breach thereof.

Facts of the Case

The plaintiffs were owners of a flour mill at Gloucester. The crank shaft of their steam-engine broke, holding up the work of the mill, and they arranged to obtain a new one from a firm of engineers at Greenwich.

It was necessary that the broken shaft should be sent as a pattern, and this was entrusted to the defendants, who traded as common carriers under the name of Pickford & Co. The plaintiffs were told by the defendants that if the shaft was sent to them by 12 o'clock any day, it would be delivered at Greenwich on the following day. It was accordingly handed over to the defendants for carriage, but the delivery at Greenwich was delayed for some days, during which time the work of the mill was at a standstill, and the plaintiffs now claimed £300 damages to cover the loss of profit ensuing. The defendants paid into Court £25 and contended that the plaintiffs could not recover anything for loss of profit.

At the trial before CROMPTON, J., the jury awarded the plaintiffs £50 damages and the defendants appealed.

Decision

The **Court of Exchequer Chamber** said that the special circumstances of the case were not made known to the defendants, who might, had they known of them, have wished to make arrangements under the contract, and, therefore, the plaintiffs could not recover anything for loss of profits of the mill, and a new trial was ordered.

In delivering judgment, ALDERSON, B., laid down the following rule :—

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case."

NOTES

This rule was followed in the very similar case of *Horne v. Midland Rail. Co.* (1873), L. R. 8 C. P. 131, where the plaintiffs consigned to the railway company a quantity of shoes, notice being given to the railway company that unless the shoes were delivered by a given date, the consignee would refuse them, but the company were not informed that there was anything exceptional in the nature of the contract for the sale of the shoes. In fact the plaintiffs were supplying the shoes to a firm in London for use of the French Army at an unusually high price. They now claimed from the railway company the difference between that contract price and the price at which they ultimately sold the shoes, but the Court of Exchequer Chamber held that as they had not given notice to the railway company that they were supplying the shoes under exceptional terms of sale, they could not recover that special loss as damages, but were limited to the loss they would ordinarily have sustained had they been supplying the goods at the market price ruling at the time.

In *Sapwell v. Bass*, [1910] 2 K. B. 486, the defendant agreed to allow his stallion Cyllene to serve one of the plaintiff's mares; he subsequently sold Cyllene to go to South America and consequently

committed a breach of contract. It was held by JELF, J., that the plaintiff's claim for the profits he might have made on the foal, based on the average profits made from other foals by Cyllene, was too remote and contingent, and that the plaintiff was only entitled to nominal damages.

In *Cointat v. Myham & Son*, [1913] 2 K. B. 220, the defendants sold to the plaintiff, a butcher, a carcase of a pig, there being implied conditions under the Sale of Goods Act, section 14 (1) and (2), that it was of merchantable quality, and reasonably fit for food. In fact it was tuberculous, and unfit for food. Without knowing this, the plaintiff exposed it for sale in his shop, where it was seized by a sanitary inspector, and the plaintiff was prosecuted and fined 20s. and costs. He now claimed from the defendants damages for breach of contract, that is to say £36 in respect of the fine and the costs incurred by him in connection with his defence, and £200 for loss of trade owing to the conviction. The jury found in favour of the plaintiff on both heads of damage, and Lord COLERIDGE, J., held that the damages claimed were not too remote but were within the principle laid down by the above case of *Hadley v. Baxendale*, and the plaintiff was entitled to judgment for £236.

In the case of *Banco de Portugal v. Waterlow & Sons, Ltd.*, [1932] A. C. 452, Waterlows contracted with the Bank to print and supply 600,000 bank notes of a certain kind, and this was done. Later, Waterlows delivered to one Marang a further quantity of notes, which they printed from the same plates, or plates made from the same die, in the erroneous belief that he was authorised by the Bank; and Marang and his associates put some of these false notes into circulation. On discovering this, the Bank withdrew all the notes of that type, and undertook to give other genuine notes in exchange for all notes of that kind presented to the Bank. It was held that Waterlows had committed a breach of contract, and the House of Lords (by a majority) decided that the measure of damages recoverable by the Bank was the value in sterling of the genuine notes issued by the Bank in exchange for the spurious ones, plus the cost of printing the notes withdrawn, the total damages being £610,392.

The case of *Williams Bros. v. Agius (E. T.)*, Ltd., [1914] A. C. 510, dealt with on page 198, and the note thereto, should be referred to.

STATUTE OF LIMITATIONS AND ACKNOWLEDGMENTS

SPENCER *v.* HEMMERDE,

[1922] 2 A. C. 507

An unconditional acknowledgment of a debt implies a promise to pay and will support an action for the debt if made within the proper statutory period before the action.

Facts of the Case

In 1910 one Benson lent £1,000 to the defendant, Hemmerde, to be repaid with interest in two months. The debt was not repaid. In 1915, when pressed for payment, the defendant wrote to Benson :—

“ I cannot at present hold out the slightest hope of paying you the capital.”

And later, in another letter, he said :—

“ It is not that I won’t pay you, but that I can’t do so . . .

“ What I wrote was not that I saw no prospect at present of being able to repay the capital, but that I saw no prospect of being able to repay the capital at present.”

No part of the principal or interest was paid, and in 1920 the plaintiff, Spencer, as trustee under a deed of arrangement with creditors executed by Benson, issued a writ against the defendant claiming payment. The defendant pleaded that the debt was barred by the Statute of Limitations, 21 Jac. I. c. 16 (The Limitation Act, 1623), but the plaintiff contended that the above-mentioned letter, and other letters from the defendant, contained a sufficient acknowledgment of the debt to take it out of the Statute.

Decision

It was held by the **House of Lords** that these letters revived the debt, and that the period of six years allowed by the Statute of Limitations commenced to run from the date the letters were written in 1915, and so the plaintiff was entitled to recover the debt and interest.

In the course of his judgment, Viscount CAVE said:—

“ Since the case of *Tanner v. Smart* (1827), 6 B. & C. 603, the law as there laid down has been uniformly accepted and it must be held to be settled law—

- “ (1) that a written promise to pay a debt given within six years before action is sufficient to take the case out of the operation of the Statute of James I;
- “ (2) that such a promise is implied in a simple acknowledgment of the debt; but (3) that where an acknowledgment is coupled with other expressions, such as a promise to pay at a future time or on a condition, or an absolute refusal to pay, it is for the Court to say whether those other expressions are sufficient to qualify or negative the implied promise to pay. . . .

“ The important thing is that the present obligation to pay is admitted, and the original promise to pay is renewed and affirmed without condition or qualification; and if that be done, there is a new promise to pay upon which an action may be founded. I do not doubt that in the present case the respondent (Hemmerde) intended his letter to be read in this sense, nor that Mr. Benson so understood it, and upon the faith of the letter, so understood, delayed his proceedings; and if so, the respondent must be held to his promise.”

NOTES

In the case of *Tanner v. Smart* (1827), 6 B. & C. 603, which was quoted with approval by the House of Lords, it was proved that within six years before action the defendant gave the plaintiff an acknowledgment in the following terms: “ I cannot pay the debt at present, but I will pay it as soon as I can,” and it was held that this was a conditional promise to pay when the defendant was able to do so, and as there was no evidence of his ability to pay, this acknowledgment was not sufficient to take the case out of the Statute of Limitations, and therefore the plaintiff was not entitled to a verdict against the defendant.

In *Re River Steamer Co., Mitchell's Claim* (1871), 6 Ch. App. 822, where Mitchell made a claim for money due to him from the company, and the company, by letter, promised to pay whatever amount should be found due on an arbitration, and later the company named an arbitrator, but M. neglected to name one, it was held that such letter did not take M.'s claim out of the Statute of Limitations, and Sir G. MELLISH, L.J., said:—

“ Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed.”

In the present case the House of Lords also approved the decision in *Cooper v. Kendall*, [1909] 1 K. B. 405. There, after the statutory period of six years had run out, but shortly before the action brought, and in answer to a letter from the plaintiff's solicitors demanding payment of a debt, the defendant wrote in reply :—

“ I admit I owe your client the sum of £210 5s., but I cannot meet this liability at the moment, although I hope to call upon you within fourteen days to make a definite proposal for repayment of that amount with interest from date of loan.”

And it was held by the Court of Appeal that that was a sufficient acknowledgment to take the case out of the Statute of Limitations, and the plaintiff was entitled to recover.

Each case has to be considered on its own facts, but the principles to be applied are clearly laid down by Viscount CAVE in the judgment from which the above extracts are taken.

It should be noted that an acknowledgment may be made either before the statutory period has run out, or afterwards, but it must be in writing, and the point to be considered is whether there has been within the statutory period a sufficient acknowledgment amounting to, or implying a promise to pay the debt.

The Limitation Act, 1623, has now been replaced by the Limitation Act, 1939 (2 and 3 Geo. 6, c. 21), which consolidates the law hitherto contained in the 1623 Act and other statutes. Acknowledgment of a debt is now governed by ss. 23 and 24 of the Act, but the law as set out in *Spencer v. Hemmerde* does not appear to be affected.

Periods of Limitation

From the point of view of the commercial lawyer the following periods of limitation are important :—

- (1) Simple contract debts can no longer be sued for after six years, s. 2 (1) (a) of the Act.
- (2) Debts on a bond or other instrument under seal, which includes a debt on a statute, have a period of limitation of twelve years, see s. 2 (3) of the Act.
- (3) Where an award has been made in arbitration proceedings, and the submission to arbitration was not under seal, actions on such award must be brought within six years, see s. 2 (1) (c) of the Act. Under s. 27 (2) terms in arbitration agreements purporting to exclude any limitation are void.
- (4) Actions *in rem* for the arrest of ships must be brought within two years, but the Court has power to extend this period in suitable cases, see s. 8, Maritime Conventions Act, 1911.
- (5) As regards carriage a period of only one year obtains in respect of actions against a carrier by sea under Art. III, r. 6, Schedule, Carriage of Goods by Sea Act, 1924. But actions against aircarriers are barred after two years, see Art.

29, First Schedule, Carriage by Air Act, 1932, which applies however only to international carriage.

There is also a provision which in effect amounts to limitation in the case of railway carriage. Condition 8 of Table A of the Statutory Terms and Conditions, 1927, provides that the company shall not be liable, in the event of loss from a package or from an unpacked consignment, or for damage, deviation, misdelivery, delay or detention, unless they are advised thereof in writing within three days and a claim is made within seven days. In the event of non-delivery of the whole of a consignment, or of any separate package, which forms part of it, written notice must be given within fourteen days, and the claim made within twenty-eight days after the receipt of the consignment by the company to whom the same was handed by the sender.

The proviso to this condition allows the substitution of a reasonable time for these short periods, if "it was not reasonably possible for (the trader) to advise the Company in writing or to make his claim in writing within the aforesaid times." In case of dispute the Railway Rates Tribunal has power to decide the matter on equitable principles and to suspend the operation of the condition in view of the circumstances of the case. However, once this condition has been fulfilled the action may be brought within the ordinary period of six years. See also condition 7 of Table B.

- (6) Under s. 10, of the Copyright Act, 1911, an action in respect of any infringement of copyright shall be begun within three years of the infringement.
- (7) Of special importance are actions in tort against Public Authorities, as for instance the Port of London Authority. The time limit within which an action must be brought is 12 months after the act causing the damage, see s. 21, of the Act. It does not however apply to cases of breach of contract, but only to torts. This Act overrides the time limit of s. 8, Maritime Conventions Act, 1911; see *The Danube II*, [1920] P. 104, [1921] P. 183.
- (8) Moneylenders must sue for the recovery of principal and interest of moneys lent by them within twelve months, see s. 13, Moneylenders Act, 1927.
- (9) Finally it should be borne in mind that wherever equitable remedies are sought no period of limitation applies, but the Court will refuse to grant the remedy where the plaintiff did not act promptly. Such equitable remedies are specific performance, for instance under s. 52, Sale of Goods Act, 1893, an injunction, for instance against acts of unfair competition, and rescission of a contract on the ground of innocent misrepresentation.

SUBSEQUENT IMPOSSIBILITY

MATTHEY v. CURLING, [1922] 2 A. C. 180

Events happening subsequently to a contract do not as a rule excuse performance of the contract.

Facts of the Case

In 1898, Curling leased to Matthey a house and grounds in Hertfordshire for 21 years. The lease contained covenants by the lessee to keep the premises in repair, to yield them up in repair, and to insure them against damage by fire, and in the event of their destruction by fire, to lay out the insurance money in rebuilding the premises, and, in case such moneys should be insufficient, to make good the deficiency out of his own moneys.

In 1904, Matthey assigned the lease to Priestley, who in 1908 assigned it to Major R. M. Richardson. He died in 1917, and the lease became vested in his executors.

In January, 1918, the military authorities, acting under the powers conferred by the Defence of the Realm Regulations took possession of the house and part of the land for the purpose of housing German prisoners of war. In February, 1919, the house was destroyed by fire. The lease expired in March, 1919, and the military authorities relinquished possession in June, 1919.

In this action, Curling claimed from Matthey damages for breach of the covenant to repair, and also payment of the rent for the last quarter of the tenancy. Matthey served a third-party notice on Priestley, and Priestley served a fourth-party notice on the executors of Major Richardson, who obtained leave to defend the action in Matthey's name, and Matthey pleaded in his defence that the performance of the covenants had become impossible in law, and that as to the rent, there had been an eviction by title paramount from part of the premises, so that he was liable for only a part of the rent, which he paid into Court.

Decision

It was held by the **House of Lords** that there had been no eviction by title paramount, and Matthey was liable for the rent, and further that the occupation by the military authorities did not excuse him from performance of the repairing covenants, and he was also liable in respect of those covenants.

Dealing with the second point, as to the alleged impossibility to perform the covenants to repair, Lord BUCKMASTER said :—

" It is said that performance had become impossible, and that consequently it must be excused. Impossibility of performance is a phrase that is often lightly and loosely used in connection with contractual obligations. There is no question here of performance having become impossible owing to its prohibition by statute, for no law has prohibited performance, though enjoyment of the premises has been interfered with by legal powers. Further, I entertain grave doubts whether there was any impossibility in fact at all. At any rate, I am satisfied that a terminable occupation by military authorities during an uncertain time, for which compensation may prove to be recoverable, constitutes no answer to the obligations of this repairing covenant."

NOTES

It is the policy of English law to hold parties who have made a contract strictly to its terms. In principle circumstances arising after its conclusion are irrelevant even though they may be wholly unexpected and increase unreasonably the burden of one party. In *Matthey v. Curling*, the burden on the lessee is perhaps not unreasonable in view of the likelihood of recovering compensation from the military authorities.

Another case where supervening "impossibility" left untouched contractual obligations was *Turner v. Goldsmith*, [1891] 1 Q. B. 544. The defendant, a shirt manufacturer, engaged the plaintiff as his agent for five years. Under the contract the plaintiff was to sell goods "manufactured or sold by the defendant as should from time to time be forwarded or submitted by sample or pattern to" him. Remuneration was to be by commission on the sales. After two years the factory was burnt down, and the defendant ceased to send any samples to the plaintiff. The latter sued for breach of contract, and the Court of Appeal, rejecting the defendant's contention that the destruction of his factory had made the performance of his obligations impossible, awarded the plaintiff substantial damages. It was held that the defendant failed to perform his obligations unless he sent the plaintiff a reasonable amount of samples to enable him to earn commission. The destruction of his factory was no excuse. LINDLEY, L.J., said at p. 550 :—

" Here the parties cannot be taken to have contemplated the continuance of the defendants' manufactory as the foundation of what was to be done; for the plaintiff's employment was not confined to articles manufactured by the defendant."

One may, therefore, conclude that had the agency referred only to goods manufactured by the defendant, the agreement between the parties would have been discharged by reason of impossibility.

Again, where a ship was chartered to go to Ichaboe, load a full

cargo of guano, and then proceed to Cork, the freight to be paid on delivery of the cargo, and where the ship, owing to unforeseen circumstances found no guano at Ichaboe, the owners were held to have committed a breach of the contract when they returned without a full cargo: *Hills v. Sughrue* (1846), 15 M. & W. 253.

There are however occasions where supervening impossibility does discharge the contract; as to these see the two following cases and the notes thereto.

TAYLOR v. CALDWELL

(1863), 3 B. & S. 826

Where a contract depends for its performance upon the existence of a specific thing, which, without any fault of the parties, and before any breach of the contract, is destroyed, the contract is discharged.

Facts of the Case

By a written contract made on May 27th, 1861, the defendants agreed to let to the plaintiffs the Surrey Gardens and Music Hall at Newington for four days, namely, June 17th, July 15th, and August 5th and 19th, 1861, for the purpose of giving four grand concerts and day and night fêtes, at a rent of £100 for each day.

On June 11th, 1861, the Music Hall was destroyed by an accidental fire, so that it became impossible to give the concerts. The plaintiffs claimed damages from the defendants for breach of the agreement.

Decision

It was held by the **Court of Queen's Bench** that the claim failed.

In delivering the judgment of the Court, BLACKBURN, J., said:—

“There are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive

contract, but as subject to an implied condition that the parties shall be excused, in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

METROPOLITAN WATER BOARD v. DICK, KERR & CO.,
[1918] A. C. 119.

Where, by reason of a change in the law, or supervening legislation, the performance of a contract becomes impossible, the contract is discharged and terminated.

Facts of the Case

By a written contract dated July 24th, 1914 (as modified by a supplemental contract dated May 10th, 1915), D., K. & Co. contracted with the Water Board to construct a reservoir, to be completed in six years, subject to a provision that if by reason of certain named events, or by reason of any difficulties, impediments, etc., whatsoever and howsoever occasioned, the contractor should, in the opinion of the engineer, have been unduly delayed or impeded in the completion of the contract, it should be lawful for the engineer, if he thought fit, to grant such extensions of time for completion as to him might seem reasonable.

The work was commenced in August, 1914, but on February 21st, 1916, it was stopped by notice from the Ministry of Munitions, acting under the Defence of the Realm Acts, requiring D., K. & Co. to cease work under the contract, and to place their labour and plant at the disposal of the Ministry for the erection of munition works.

In May, 1916, the Water Board commenced this action, claiming (*inter alia*) that the above contract was still binding on the parties. The defendants (D., K. & Co.) contended that by reason of the notice from the Ministry of Munitions of February 21st, 1916, the further performance of the contract had become impossible and illegal, and that the parties were released from all further liability thereunder. It was admitted by both parties that the prohibition of the Ministry was still in operation.

Decision

It was held by the **House of Lords** that the provision for extending the time did not apply to this prohibition of the Ministry of Munitions, and that as the interruption was of such a nature

and duration as to make the contract when resumed a really different contract, the contract had ceased to be operative.

Lord DUNEDIN said :—

“ On the whole matter I think that the action of the Government, which is forced on the contractor as a *vis major*, has by its consequences made the contract, if resumed, a work under different conditions from those of the work when interrupted. I have already pointed out the effect as to the plant, and, the contract being a measure and value contract, the whole range of prices might be different. It would in my judgment amount, if resumed, to a new contract ; and as the respondents ” (that is D., K. & Co.) “ are only bound to carry out the old contract, and cannot do so owing to supervenient legislation, they are entitled to succeed in their defence to this action.”

NOTES

Matthey v. Curling (see p. 83) laid down the general rule that events happening after the parties have concluded their contract cannot influence their rights and duties under the latter. But *Taylor v. Caldwell* and *Metropolitan Water Board v. Dick, Kerr & Co.* illustrate two very important exceptions to the rule. One of these is accidental destruction of, what may be called, the tools without which the contract cannot possibly be performed. The other exception rests less on impossibility than on impracticability. Here the parties remain physically able to perform the contract. But new events have occurred, events which not only are bound to make performance more onerous and, perhaps, reduce the expected profit, as in *Matthey v. Curling*, but events which change the whole purpose of the contract for both parties. If, in the light of such events, the law insisted on performance this would amount to forcing a new contract on the parties. Instead, the law regards the purpose of these contracts as frustrated, and the contract as discharged. *Metropolitan Water Board v. Dick, Kerr & Co.* illustrates this rule, which is now usually termed that of commercial frustration.

But frustration depends not only on new legislation or executive orders as in that case. It may result from other events. In *Krell v. Henry*, [1903] 2 K. B. 740, rooms were rented to view the coronation procession of King Edward VII, and a deposit paid. Later the King was taken ill and the procession cancelled. The contract for the rooms did not mention that the rooms were rented for the purpose of seeing the procession. But the Court found that this was the foundation of the contract, that the procession taking place was an implied condition. It was accordingly held that the contract was discharged.

Not so where the purpose frustrated by subsequent events was not the sole purpose. In *Herne Bay Steamboat Co. v. Hutton*, [1903]

2 K. B. 683, the defendant chartered a steamer to see the royal review and to cruise round the fleet. The review was cancelled, but the assembly of naval vessels remained. So the Court held that the contract stood; for the review was not the sole basis of the contract.

Again, a charterparty was upheld in *Tamplin S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 2 A. C. 397. There a tank steamship was chartered for 60 months at a fixed sum per month, with an exception in the case of arrests and restraints of princes; one clause entitled the charterers to sub-let the steamer on Admiralty and other service. In 1914, when the charterparty had another three years to run, the Admiralty requisitioned the ship and employed it as a troop transport. The owners thereupon claimed that the charterparty had been terminated by the Admiralty requisition. But the charterers resisted; they were willing to continue paying the agreed freight. A majority of the House of Lords held that there was no implied condition that this kind of interruption should excuse the parties from further performance. This had become neither impossible nor impracticable, and the contract stood. In his speech, Lord HALDANE explained the doctrine in this way (p. 406):—

“When people enter into a contract which is dependent for the possibility of its performance on the continued availability of a specific thing, and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is *prima facie* regarded as dissolved. . . . There may be included in the terms of the contract itself a stipulation which provides for the merely partial or temporary suspension of certain of its obligations, should some event (such, for instance, as in the case of the charter-party under consideration, restraint of princes) so happen as to impede performance. In that case the question arises whether the event which has actually made the specific thing no longer available for performance is such that it can be regarded as being of a nature sufficiently limited to fall within the suspensory stipulation, and to admit of the contract being deemed to have provided for it and to have been intended to continue for other purposes. Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation.”

It will be observed that two different theories of commercial frustration are put forward in *Taylor v. Caldwell*, and the *Tamplin Case* respectively. The question of what is the correct theory upon which the doctrine should be based has given rise to much discussion. The one which has received most support and which must now be regarded as correct is that of the implied term, under which the law assumes that if the

parties had foreseen the events which actually happened they would have dealt with the matter by the terms of the contract, and accordingly implies a term excusing performance. This it will be remembered was the view of the matter taken by Lord BLACKBURN in *Taylor v. Caldwell* (above), and it has recently been authoritatively upheld by the House of Lords in *Joseph Constantine Steamship Line v. Imperial Smelting Corporation*, [1942] A. C. 154 where Viscount Simon, L.C., described it as the most satisfactory basis.

Another theory which has received the support of eminent judges is that of the disappearance of the basis upon which the parties entered upon their contract; if the basis disappears, e.g. where it is the continuance of the existing law, then the contract disappears also. This is the view which received the support of Lord HALDANE in the *Tamplin Case* (above) and has been favoured by some text book writers.

One point should however be clearly understood, a contract is frustrated only if the impossibility arises from circumstances beyond the control of the parties. This was illustrated by *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.*, [1935] A. C. 524. The appellants had chartered the respondents' trawler which could be operated only with an otter trawl. When the charterparty was renewed a Canadian Statute forbade trawlers with otter trawls to leave port, except with the licence of the Minister. Application was therefore made for the grant of five licences, because the appellants had been operating five trawlers. However, the Minister intimated that only three licences would be granted, and he requested the appellants to nominate three out of the five trawlers which they desired to operate under licence. The appellants did not name the respondents' trawler, and no licence was consequently granted in respect of it. The appellants accordingly did not make use of the trawler and refused to pay hire, pleading frustration. The Court held that there could be no application of the doctrine of frustration. The impossibility to employ the respondents' vessel was caused by their not applying for a license in respect of it, in other words the cause was one over which they did exercise control, and they had to bear the consequences of their act.

When the contract is discharged by impossibility or frustration there can, of course, be no case for an action for damages. In *Robinson v. Davison* (1871), L. R. 6 Ex. 269, the defendant's wife, as his agent, contracted with the plaintiff that she would play the piano at a concert to be given by the plaintiff on a certain day. On that day she was ill and could not perform, and the plaintiff sued for damages. It was held that the contract was subject to an implied condition that the wife should be well enough to perform, that her subsequent illness discharged the contract, and that no action for damages lay.

It remains to be explained what happens to the money consideration when a contract is so discharged—the rent for the music hall that perished in flames, in *Taylor v. Caldwell* (above p. 85), the rent for the room after the procession was cancelled, in *Krell v. Henry* (above p. 87), the price agreed for the construction work which was frustrated, in

Metropolitan Water Board v. Dick, Kerr & Co. (above p. 86). Before 1943, it was thought that these obligations continued until the discharge of the contract and then automatically ceased. This was expressed by the maxim, the loss lies where it falls. In *Krell v. Henry* the hirer had to pay nothing, because the contract provided for the rent to be paid after the event, which did not happen. But in another coronation case, *Chandler v. Webster*, [1904] 1 K. B. 493, where rent was payable in advance, the tenant was held liable to pay the rent in a similar contract, because the latter provided for payment in advance, that is, before the event that frustrated the contract.

Such accidental results were widely regarded as unsatisfactory, and the rule was eventually declared bad in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* [1943], A. C. 32. There Polish buyers bought machinery from British sellers in July, 1939, c.i.f. Gdynia, for £4,800; £1,600 of this was agreed to be payable with the order on account, but in fact only £1,000 was paid. Before the delivery day arrived the Germans occupied Gdynia, and it was held that the contract was discharged by frustration. Under the rule in *Chandler v. Webster*, the buyers who got nothing out of the contract would have been liable to pay the remaining £600 which had been due prior to frustration. Instead, they sued for the return of the £1,000 paid on account, arguing that the rule in *Chandler v. Webster* was bad law, and the House of Lords upheld this view, because the consideration for which the money was paid had wholly failed; they would have had no right of action had the £1,000 not been on account but an out-and-out payment. Lord ATKIN said (p. 55):—

“The application of an old-established principle of the common law does enable a man who has paid money and received nothing for it to recover the money so expended. It leaves the man who has received the money and given nothing for it in no worse position than if he had received none.”

Yet the rule established in the *Fibrosa Case* was only less unfair than that in *Chandler v. Webster*, for the man who has to return the money may suffer substantial loss. In circumstances like those of the coronation cases, for example, money may have been spent on scaffolding for seats in anticipation of performance, the seller of goods may have had expenses for machinery to manufacture the goods ordered; finally, the buyer of a house the building of which was cut short by Government order may have received some benefit, which can be used later. The problem of finding an equitable solution had to be dealt with by Parliament which remedied the position by passing the Law Reform (Frustrated Contracts) Act, 1943. This provides for such equitable payments or re-payments, once it has been established at common law that performance has become impossible or frustrated. No cases have as yet been reported on this Act. But even so it is quite possible that if the *Fibrosa Case* had been decided after the Act the sellers would have

been entitled to retain part of the £1,000 to compensate them for expenses incurred, say by buying or making tools necessary to construct the machinery bought by the Polish company. See Stevens' Mercantile Law, 10th Edn., p. 100 *et seq.*

ESTOPPEL

PICKARD v. SEARS

(1837), 6 A. & E. 469

The doctrine of Estoppel.

Facts of the Case

In April, 1834, the Sheriff of Surrey seized certain machinery at the premises of one Metcalfe, under an execution levied in pursuance of a judgment obtained by a creditor against Metcalfe. The machinery was included in a mortgage given by Metcalfe to the plaintiff in January, 1834, to secure money lent. The plaintiff ascertained that the machinery had been seized and the creditor's solicitor had several conversations with the plaintiff about the sale of the machinery, in the course of which the plaintiff told the solicitor that Metcalfe owed him £500, but never said that he had any claim to the machinery. The plaintiff was also informed that the defendants were about to purchase the machinery. The Sheriff sold it to the defendants in August, 1834, and then for the first time the plaintiff claimed the machinery under his mortgage, and gave notice of his claim to the defendants and demanded the machinery from them. They refused to hand it over.

It was not disputed that the mortgage by Metcalfe to the plaintiff was made *bona fide*, nor that the defendants in fact bought the machinery without notice of the mortgage.

Decision

It was held by the **Court of King's Bench** that by his conduct the plaintiff was estopped from setting up his claim to the goods.

In delivering judgment, Lord DENMAN, C.J., said:—

“The rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter

his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. . . . And we think his " (the plaintiff's) " conduct in standing by and giving a kind of sanction to the proceedings under the execution, was a fact of such a nature, that the opinion of the jury ought to have been taken, whether he had not, in point of fact, ceased to be the owner."

NOTES

This rule is called the rule of estoppel. In *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* it was thus described by SCRUTTON, L.J., in the Court of Appeal, [1923] 2 K. B. 630, at p. 657:—

"Estoppel is not a cause of action, but a rule of evidence by which A.'s statements or conduct to B. alleging one state of circumstances, if relied on and acted on by B., prevent A. from proving against B. the truth—namely, that the state of circumstances alleged does not exist. But if A.'s original allegation is caused by B.'s misrepresentation of the state of circumstances, B. cannot take advantage of an allegation based on his own misrepresentation."

The decision of the Court of Appeal in that case was reversed by the House of Lords (see [1925] A. C. 112), but the above statement of the rule of estoppel by SCRUTTON, L.J., was not dissented from.

In the recent case of *Greenwood v. Martins Bank, Ltd.*, [1933] A. C. 51, Lord TOMLIN said that to give rise to an estoppel the essential factors were: (1) a representation or conduct amounting thereto intended to induce a course of conduct; (2) an act or omission by the person to whom the representation was made resulting from such representation; (3) detriment to such person as a consequence of his act or omission.

It is important to grasp this doctrine of estoppel because it is applied in numerous different ways, for instance, as between third parties and retired partners; see *Scarf v. Jardine* (1882), 7 App. Cas. 345, *infra*, p. 142. Other good examples are the so-called negotiability by estoppel (see Stevens' Elements of Mercantile Law, 10th Edn., p. 345), and the clean bill of lading in the hands of a *bona fide* holder for value (see Stevens' Elements of Mercantile Law, 10th Edn., p. 490).

INNOCENT MISREPRESENTATION AND FRAUD

DERRY v. PEEK

(1889), 14 App. Cas. 337

A false representation honestly thought to be true gives no rise to an action for damages. The nature of fraud.

Facts of the Case

By a special Act of Parliament, the Plymouth, Devonport and District Tramways Co., of which Derry and the other appellants were directors, were empowered to make certain tramways. By section 35 of this Act, the carriages might be moved by animal power and, with the consent of the Board of Trade, by steam or any mechanical power, subject to the regulations of the Board. By section 34 of the Tramways Act, 1870, which was incorporated in the above Act, all carriages used on any tramway were to be moved by the power prescribed by the special Act, and where no such power was prescribed, by animal power only.

The directors issued a prospectus which contained the following statement :—

“One great feature of this undertaking, to which considerable importance should be attached, is, that by the special Act of Parliament obtained, the company has the right to use steam or mechanical motive power instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses.”

Peek applied for and obtained shares in the company, relying, as he alleged, on the representations in this paragraph. The company proceeded to make tramways, but the Board of Trade refused to consent to the use of steam or mechanical power, except on certain portions of the tramways. In the result the company was wound up, and Peek brought an action against the appellants for deceit, claiming damages for fraudulent misrepresentations contained in the above statement.

Decision

The **House of Lords** held that the directors (the appellants) had a reasonable belief in the truth of the statement, and that the action must fail.

Lord HERSCHELL, in the course of his judgment, said:—

"First, in order to sustain an action for deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth. . . . Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made. . . . In my opinion, making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed, though on insufficient grounds. . . .

"At the same time I desire distinctly to say that when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one."

NOTES

Derry v. Peek establishes the general rule that only fraudulent representations entitle the injured party to claim damages. But the student should not allow himself to be misled by the fact that this case was decided on misrepresentations in a limited company's prospectus. Since then statute (see now the Companies Act, 1929) has established stricter rules to protect the public, and under s. 37 even innocent misrepresentations in prospectuses inviting the public to subscribe for shares or debentures are actionable. Apart from defences in special cases—see Stevens' Mercantile Law, 10th Edn., pp. 117-118 and *infra*

p. 156—directors, promoters, and other persons who have authorised the issue of the prospectus are liable to subscribers who bought shares or debentures on the faith of the misrepresentation, innocent or fraudulent, for loss or damage suffered on that account.

A fraudulent misrepresentation can only be made the ground of an action by the persons to whom it was addressed, or who were intended to act upon it, and thus fraudulent misrepresentations in a prospectus are actionable by original allottees who took their shares from the company, but not by shareholders who acquired their shares from original allottees. (See *Peek v. Gurney* (1873), L. R. 6 H. L. 377.)

But where a prospectus is issued with the object not merely of inducing applications for original allotments of shares, but also of inducing persons to whom the prospectus is sent to purchase shares in the market, in such cases the parties issuing the prospectus will be liable for damages, in respect of false statements in the prospectus known by them to be false, to any person to whom the prospectus has been sent, who is induced by the prospectus to purchase shares and suffers damage. (See *Andrews v. Mockford*, [1896] 1 Q. B. 372.) Note that *Peek v. Gurney* and *Andrews v. Mockford* were decided before the enactment of the rules now contained in the Companies Act, 1929. They are authorities for all fraudulent misrepresentations, and, as far as the Companies Act is concerned, for innocent representations as well.

Sometimes, although fraud cannot be proved, statements may, nevertheless, be made the subject of proceedings, as where they are made in breach of a fiduciary duty or in breach of a contract to exercise due care and skill, as in the case of the relationship existing between solicitor and client. (See per Viscount HALDANE, L.C., in *Nocton v. Ashburton*, [1914] A. C., at p. 958.)

Although every word in a statement may be literally true, the result of the whole may induce a false impression by virtue of omissions. If this is done intentionally it amounts to fraud. Thus in *R. v. Kylsant*, [1932] 1 K. B. 442, debentures were offered to the public for subscription. The prospectus stated: “The annual balance available . . . after providing for depreciation and interest on existing debenture stocks has been sufficient to pay interest on the present issue more than five times over. . . . After providing for all taxation, depreciation of the fleet, etc. . . . the dividends on the ordinary stock during the last seventeen years have been as follows:” then the dividend payments were set out. All these statements were literally true, but it was nevertheless held fraudulent because it omitted to disclose that the profits, out of which the dividends and interest had been paid, had been made in the years 1918 to 1920, and that every year from 1921 to 1927 had ended with a loss. This was a criminal case, but the same principles apply to civil ones. As to the liability of a promoter for statements made in a prospectus see *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218, illustrated *infra*, p. 154.

REDGRAVE v. HURD

(1881), 20 Ch. D. 1

Where one person induces another to enter into a contract with him by a material representation of fact which is untrue, but is made innocently, the latter is entitled to repudiate the contract, but not to claim damages.

Facts of the Case

The plaintiff, a Birmingham solicitor, advertised that he was shortly retiring, and offered a partnership in a "moderate practice, with extensive connections," to an efficient lawyer who would buy plaintiff's suburban residence for £1,600. The defendant answered the advertisement, and at an interview plaintiff stated that the business brought in about £300 a year. At a subsequent interview he produced summaries of business done in the last three years, which showed gross receipts amounting to not quite £200 a year, and produced papers which he said related to other business not included in the summaries. These papers, which the defendant did not examine, showed only a trifling amount of business. The gross returns were in fact about £200 a year.

The defendant ultimately agreed to purchase the house and a share in the business for £1,600, and paid a deposit of £100, but when he found that the business was practically worthless, he refused to complete the purchase. The plaintiff brought an action for specific performance, and the defendant counter-claimed to have the contract rescinded and for recovery of his deposit, and damages.

Decision

The **Court of Appeal** held that the defendant was entitled to have the contract rescinded and the deposit returned, but could not claim damages, as he had not alleged that the plaintiff made the representations with knowledge of their untruth.

In his judgment, BAGGALLAY, L.J., said :—

"The mere fact that a party has the opportunity of investigating and ascertaining whether a representation is true or false is not sufficient to deprive him of his right to rely on a misrepresentation as a defence to an action for specific performance. The person who has made the misrepresentation cannot be heard to say to the party to whom he has made that representation, ' You chose to believe me

when you might have doubted me, and gone further.' The representation once made relieves the party from an investigation, even if the opportunity is afforded. I do not mean to say that there may not be certain circumstances of suspicion, which might put a person upon inquiry, and make it his duty to inquire, but under ordinary circumstances the mere fact that he does not avail himself of the opportunity of testing the accuracy of the representation made to him will not enable the opposing party to succeed on that ground."

On the question of the defendant's claim for damages, JESSEL, M.R., said :—

" As regards the defendant's counter-claim, we consider that it fails so far as damages are concerned, because he has not pleaded knowledge on the part of the plaintiff that the allegations made by the plaintiff were untrue, nor has he pleaded the allegations themselves in sufficient detail to found an action for deceit."

NOTES

In *Adam v. Newbigging and Another* (1888), 13 App. Cas. 308, it was held by the House of Lords, affirming the Court of Appeal, that a person who was induced to enter into a contract of partnership by innocent misrepresentations was entitled to have the contract rescinded and to have the amount of capital contributed by him returned. This is restitution which is, of course, quite different from damages. The Court of Appeal also held that he was entitled to be indemnified against the debts and liabilities of the partnership, but this point did not arise for decision in the House of Lords, which therefore expressed no opinion upon it.

The decision in *Adam v. Newbigging, supra*, as far as it relates to the return of capital contributed to the partnership, is not easy to fit in with other decisions on this point. In the leading case of *Wilde v. Gibson* (1848), 1 H. L. Cas. 605, Lord CAMPBELL said, at p. 632 :—

" If there be, in any way whatever, misrepresentation or concealment, which is material to the purchaser, a court of equity (this was prior to the Judicature Act, 1873; now every court has this power) will not compel him to complete the purchase; but where the conveyance has been executed, I apprehend, my Lords, that a court of equity will set aside the conveyance only on the ground of actual fraud. And there would be no safety for the transactions of mankind, if, upon a discovery being made at any distance of time of a material fact not disclosed to the purchaser, of which the vendor had merely constructive notice, a conveyance which had been executed could be set aside."

Though the first words are general, the whole passage only relates to the conveyance of real property, and it is worth noticing that the decision

has been applied only where property had been handed over, as where a lease had been executed after an innocent misrepresentation, see *Angel v. Jay*, [1911] 1 K. B. 666, or where a chattel had been bought, and the property transferred to the purchaser, see *Seddon v. North Eastern Salt Co., Ltd.*, [1905] 1 Ch. 326.

Wilde v. Gibson, *supra*, was not referred to in *Adam v. Newbigging*, *supra*, and it would seem that the strict rule, somewhat illogically, only applies to contracts of sale of land or chattels. In respect of other contracts a wider rule appears to be applied. As was said by SWINFEN EADY, L.J., in *Hulton v. Hulton*, [1917] 1 K. B. 813, at p. 821:—

"The general rule is that as a condition of rescission there must be *restitutio in integrum* (that is the parties must be placed in the position they were prior to the contract), but at the same time the Court has full power to make all just allowances. It was said by Lord BLACKBURN in *Erlanger v. New Sombrero Phosphate Co.* that the practice had always been for a Court of Equity to give relief by way of rescission whenever by the exercise of its powers it can do what is practically just, though it cannot restore the parties to the state they were in before the contract."

Though there is not much authority on the point the trend of such as there is rather indicates that only in respect of contracts of sale will execution of the contract bar restitution and therefore rescission, in other types of contract rescission will be granted, whenever restitution is substantially possible in the individual case.

This distinction is not made if fraud is proved or where a breach has been committed of a fiduciary relationship. Thus in *Armstrong v. Jackson*, [1917] 2 K. B. 822, a stockbroker had been instructed to buy securities for his client. In breach of this mandate he sold him his own securities without disclosing this fact. It was held by McCARDIE, J., that the client was entitled to rescind the contract several years after the transaction had taken place, provided he had acted speedily after notice received, and although the shares had substantially depreciated in the interval.

MISTAKE

(1) **LEWIS v. CLAY**
(1897), 67 L. J. Q. B. 224

(2) **HOWATSON v. WEBB,**
[1908] 1 Ch. 1

Mistake as to nature of transaction.

Facts of the First Case

The defendant, a young man of 21, was a member of a house-party in which Lord William Nevill was also a guest. Nevill came to the defendant's bedroom, and asked him to witness some documents. The documents were covered up with blotting or other paper, and there were four openings in them. The defendant inquired what the documents were, and Nevill said they related to a private matter connected with his sister's marriage settlement and certain divorce proceedings pending, and that he would rather not show them unless the defendant insisted. On the faith of this assertion, the defendant signed his name four times, and Nevill himself signed twice. The defendant said at the trial that he had known Nevill for some years, and that up to that time he had no reason to doubt his honour, and that when he signed the documents his sole intention was to witness Nevill's signature.

It turned out that the documents were two promissory notes to the value of £11,113, made jointly and severally by Nevill and the defendant, and two letters referring to the notes, and authorising the plaintiff to pay the moneys in question to Nevill. After getting the defendant's signature, Nevill took the notes and letters to the plaintiff, who provided the amounts in question, and acted in good faith. The plaintiff now sued the defendant to recover the amounts due on the notes, £11,113.

At the trial, the jury found (*inter alia*) that the defendant's account of the circumstances under which he signed his name was substantially true, and that under the circumstances he had not been guilty of want of due care in signing the documents.

Decision in the First Case

Lord RUSSELL, C.J., held that the plaintiff could not recover from the defendant, as, without any negligence or want of due care

on his part, he had been induced to sign the notes in the belief that they were entirely different documents, and in these circumstances he was not estopped from setting up the true facts ; and he further held that the plaintiff, being the original payee of the promissory notes, was not a "holder in due course" thereof.

The learned Judge said, at p. 657 :—

" A promissory note is a contract by the maker to pay the payee. Can it be said that in this case the defendant contracted to pay the plaintiff? His mind never went with such a transaction ; for all that appears, he had never heard of the plaintiff, and his mind was fraudulently directed into a different channel by the statement that he was merely witnessing a deed or other document. He had no contracting mind, and his signature, obtained by untrue statements fraudulently made, to a document of the existence of which he had no knowledge, cannot bind him."

Facts of the Second Case

The defendant (Webb) was at one time managing clerk to a solicitor named Hooper. During that time he acted as Hooper's nominee in a building speculation relating to certain land at Edmonton, owned by Hooper. After he had left, Hooper requested him to sign some deeds transferring this property. The defendant called at Hooper's office, where the deeds were lying open on a table. He asked what they were, and was again told that they were just deeds transferring the Edmonton property which had been in his name. Hooper appeared to be in a hurry and went out, asking the defendant to hurry up and join him at lunch. When Hooper had left the office, the defendant signed the deeds, without reading them, in the presence of Hooper's clerk.

One of the deeds was a mortgage for £1,000 of certain building plots at Edmonton by the defendant to a client of Hooper's named Whitaker, who had entrusted Hooper with a sum of money to invest in mortgage securities. It contained the usual covenant by the mortgagor to pay principal and interest. The defendant never paid any interest on the mortgage, and the evidence showed that Hooper himself paid this interest, and also paid off £200 of the principal sum.

Subsequently Whitaker transferred his interest in this mortgage to the plaintiff (Howatson), who brought this action against the defendant to recover payment of the mortgage-money, £800. The defendant pleaded *non est factum*, namely, that as he executed the deed on a false representation, and under a mistake as to its nature, he was not bound by it.

Decision in the Second Case

The **Court of Appeal** held that the defendant was bound, and approved the judgment of WARRINGTON, J., who said, at [1907] 1 Ch. 537, p. 549:—

“What does the evidence in the present case show? I may go so far in the defendant's favour as to say that Webb (the defendant), having regard to his knowledge of Hooper, when Hooper said that the deeds were 'deeds for transferring the Edmonton property,' was justified in believing that they were deeds such as a nominee could be called upon to execute either in favour of a new nominee or for the purpose of putting an end to his own position of nominee, and certainly not a deed creating a mortgage to another person. But, in my opinion, that is not enough. He was told that they were deeds relating to the property to which they did in fact relate. His mind was, therefore, applied to the question of dealing with that property. The deeds did deal with that property. The misrepresentation was as to the contents of the deed, and not as to the character and class of the deed. He knew he was dealing with the class of deed with which in fact he was dealing, but did not ascertain its contents. The deed contained a covenant to pay. Under these circumstances, I cannot say that the deed is absolutely void. It purported to be a transfer of the property, and it was a transfer of the property.”

NOTES

In *Foster v. Mackinnon* (1869), L. R. 4 C. P. 704, the defendant, an old man, was induced to put his name on the back of a bill of exchange by the fraudulent representation of the acceptor of the bill that he was signing a guarantee. In an action against him on the bill by a *bona fide* holder for the value thereof, who had no notice of these facts, the jury found that the defendant was not negligent and it was held that he was not liable.

In *Carlisle and Cumberland Banking Co. v. Bragg*, [1911] 1 K. B. 489, Rigg was a customer of the plaintiffs, and he required a guarantee of his overdraft with them. On a previous occasion the defendant had signed some papers for R. relating to insurance, and on the present occasion R. told the defendant that that paper had got wet and blurred in the rain, and requested him to sign another paper which he (R.) now produced. The defendant signed it without reading it through and at the trial he said he thought this paper related to the same matter as the previous one. In fact, it was a guarantee to the plaintiffs of R.'s account up to £150. In an action by the plaintiffs against the defendant on the guarantee, the jury found that the defendant did not know it was a guarantee, that he was induced to sign it by the fraud of R. but that he was negligent in signing it. The Court of Appeal held, nevertheless, that the defendant was not liable, because he (the defen-

dant) was under no duty to the plaintiffs in the matter, and, therefore, his negligence in signing did not render him liable nor estop him from denying that he had made a contract of guarantee with the plaintiffs, and also because the proximate cause of the plaintiffs' loss was R.'s fraud and not the defendant's negligence.

The result of the different cases appears to be this: where a person is induced to sign a negotiable instrument by a false representation as to the nature of the document, or as to the capacity in which he is signing, and is negligent in doing so, he is estopped from denying his liability to a holder in due course, who has no notice of the true facts. In *Lewis v. Clay* (above) and in *Foster v. Mackinnon* (above) the defendants were not negligent; nor was the plaintiff in the former case a holder in due course. On the other hand where a person is so induced to sign some contract other than a negotiable instrument, as in the case of the *Carlisle and Cumberland Banking Co. v. Bragg* (above), then the mere proof of negligence will not make him liable, unless he owes a duty to the other party to the contract.

The cases further show that where a person executes a deed which he knows deals with certain property, then he will be bound by it if in fact the deed does deal with that property, but in a manner different from that represented to him, save where he is illiterate, blind, or otherwise incapacitated. (See also *L'Estrange v. Graucob, Ltd.*, [1934] 2 K. B. 394, illustrated *supra*, p. 22.)

(1) CUNDY v. LINDSAY

(1878), 3 App. Cas. 459.

(2) PHILLIPS v. BROOKS, LTD.,

[1919] 2 K. B. 243.

Mistake as to the identity of the other party to a contract.

Facts of the First Case

One Alfred Blenkarn hired a room on the corner of Little Love Lane and Wood Street, Cheapside. Though the entrance was in Little Love Lane, he described it as 37 Wood Street. He wrote letters from this address to Lindsay & Co., linen manufacturers, in Belfast, ordering from them a quantity of goods, chiefly handkerchiefs. In signing these letters he used no initial as representing any Christian name, and the name signed was so written as to appear to be "Blenkiron & Co." There was a highly respectable firm of W. Blenkiron & Son carrying on business at 123 Wood Street.

L. & Co. knew the name of Blenkiron & Son, but not their

address, and they sent the goods so ordered to "Messrs. Blenkiron & Co., 37 Wood Street, Cheapside," and the invoices were made out in the same way. Blenkarn received the goods and sold some of them to Messrs. Cundy, who were *bona-fide* purchasers. Blenkarn did not pay, and L. & Co. brought an action against him for the money due to them. Later, Blenkarn's fraud was discovered, and he was prosecuted and convicted. L. & Co. then sued Cundys for unlawful conversion of the handkerchiefs received by them, and the case turned on the question whether the property in the goods had ever passed from L. & Co. to Blenkarn.

Decision in the First Case

The **House of Lords** held that no contract had been made with Blenkarn, and that the property in the goods did not pass to him, so that he never had a title which he could transfer to Cundys, who were therefore liable to Lindsay & Co. for the value of the goods.

In the course of his judgment, Lord CAIRNS, L.C., said, at p. 463 :—

"By the law of our country the purchaser of a chattel takes the chattel as a general rule subject to what may turn out to be certain infirmities in the title. . . . If it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract, which would enable the original owner of the goods to reduce it, and to set it aside, because these circumstances so enabling the original owner of the goods, or of the chattel, to reduce the contract and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the intervals while the contract remained unreduced. My Lords, the question, therefore, in the present case . . . really becomes the very short and simple one which I am about to state. Was there any contract which, with regard to the goods in question in this case, had passed the property in the goods from the Messrs. Lindsay to Alfred Blenkarn? . . . How is it possible to imagine that . . . any contract could have arisen between the respondents (Lindsay & Co.) and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never even for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever. . . . The result, therefore, my Lords, is this, that your Lordships have not here to deal with one of those cases in which there is *de facto* a contract

made which may afterwards be impeached and set aside, on the ground of fraud; but you have to deal with a case which ranges itself under a completely different chapter of law, the case, namely, in which the contract never comes into existence. My Lords, that being so it is idle to talk of the property passing. The property remained, as it originally had been, the property of the respondents and the title which was attempted to be given to the appellants was a title which could not be given to them."

Facts of the Second Case

On April 15th, 1918, a man named North went to the plaintiff's jeweller's shop, and asked to see some pearls and rings. He selected goods to the value of £3,000. He wrote out a cheque for the amount, at the same time stating that he was Sir George Bullough, of St. James's Square. The plaintiff knew that there was such a person, and finding on reference to a directory that the address given was correct, permitted North to take away one ring, which he said he wanted at once for his wife's birthday. The cheque was dishonoured, and North was subsequently convicted of obtaining the ring by false pretences.

In the meantime, on April 16th, North, in the name of Firth, had pledged the ring with the defendants, who were pawn-brokers, and who in good faith, and without notice, advanced £350 upon it.

The plaintiff sued the defendants for the return of the ring or for £450, its value, and damages, and the question was whether the property had passed.

Decision in the Second Case

HORRIDGE, J., held that the property in the ring had passed to North, that the plaintiff intended to sell the ring to the person whom he saw in his shop and with whom he made the contract (that is North), and though he was induced to so sell by the fraud of North, that made the contract voidable but not void, and as in the meantime the defendants had taken the ring from North in good faith for value and without notice, they were protected, and in giving judgment for the defendants accordingly, the learned Judge said, at p. 246 :—

"The question, therefore, in this case is whether or not the property had so passed to the swindler as to entitle him to give a good title to any person who gave value and acted *bona fide* without notice. This question seems to have been decided in an American case of *Edmunds v. Merchants' Despatch Transportation Co.* (135 Mass. 283, 284). The headnote in that case contains two propositions, which I think adequately express my view of the law. They are as follows: (1) 'If A., fraudulently assuming the name of a

reputable merchant in a certain town, buys, in person, goods of another, the property in the goods passes to A.' (2) 'If A., representing himself to be a brother of a reputable merchant in a certain town, buying for him, buys, in person, goods of another, the property in the goods does not pass to A.' The following expressions used in the judgment of MORTON, C.J., seem to me to fit the facts in this case: 'The minds of the parties met and agreed upon all the terms of the sale, the thing sold, the price and time of payment, the person selling and the person buying. The fact that the seller was induced to sell by fraud of the buyer made the sale voidable, but not void. He could not have supposed that he was selling to any other person; his intention was to sell to the person present, and identified by sight and hearing; it does not defeat the sale because the buyer assumed a false name or practised any other deceit to induce the vendor to sell.' Further on, MORTON, C.J., says: 'In the case before us, there was a *de facto* contract, purporting, and by which the plaintiffs intended, to pass the property and possession of the goods to the person buying them; and we are of opinion that the property did pass to the swindler who bought the goods.'"

NOTES

In *Gordon v. Street*, [1899] 2 Q. B. 641, the plaintiff, a money-lender, advertised under the fictitious name of Addison, and the defendant borrowed £100 from him, believing him to be Addison, and giving him a promissory note for £150, the £50 being for interest. Later, it appeared that the plaintiff was in fact Gordon, a well-known moneylender. The plaintiff sued to recover the £100, and the defendant paid into Court £110 in satisfaction, and said that if he had known who the plaintiff was, he would not have entered into any contract with him. It was held by the Court of Appeal, affirming BUCKNILL, J., that the defendant was entitled to repudiate the contract when he discovered the identity of the plaintiff, and the plaintiff could not recover the full sum of £150.

But a mistake as to the identity of the other party to a contract will not avoid the contract where the defendant would have been equally willing to make the same contract with anyone else, so that personal considerations did not influence him in the matter. (See *Smith v. Wheatcroft* (1878), 9 Ch. D. 223.)

In the case of *Lake v. Simmons*, [1927] A. C. 487, the plaintiff, a jeweller, was insured under a Lloyd's policy against theft, but there was a clause exempting the insurers from liability in the case of "loss by theft or dishonesty committed by . . . any customer or broker or broker's customer in respect of goods entrusted to them by the assured." A woman who had previously bought goods at the plaintiff's shop, went to the shop on later occasions and obtained from the plaintiff two valuable pearl necklets by falsely stating that she wished

to show one to her husband for his approval. She gave his name and said he wished to give it to her as a birthday present. She said she wished to show the other to a gentleman for his approval. She also gave his name and said he wished to give a necklet to her sister as a wedding present. In fact she was not married to the man she mentioned as her husband, and he knew nothing of these transactions. The other man whose name she gave was a fictitious person altogether, and in addition she had no sister. She herself disposed of both the necklets and they had not been found, and she was convicted of theft of the necklets and received 16 months' hard labour. The plaintiff claimed the value of the necklets from his insurers but they pleaded the exemption clause. On appeal the House of Lords accepted the findings of the Courts below that this woman's conduct was fraudulent, and that she had been guilty of larceny by a trick, and held that the plaintiff had not "entrusted" the necklets to her, because there was no real consent by him to her having possession, and also that as to these necklets she was not really a "customer" within the meaning of the exemption clause, and therefore the insurers were liable to the plaintiff. (See p. 191, *infra*.)

RAFFLES *v.* WICHELHAUS

(1864), 2 H. & C. 906, 33 L. J. Ex. 160

Where the parties to a contract are under a mutual mistake as to the identity of the subject-matter of the contract it is void.

Facts of the Case

The defendants agreed to purchase from the plaintiff 125 bales of cotton "to arrive *ex* 'Peerless' from Bombay." By this, the defendants intended a ship, "Peerless," which sailed from Bombay in October, but the plaintiff meant a ship, "Peerless," which sailed from Bombay in December, and the cargo tendered to the defendants actually arrived in that ship.

The plaintiff sued the defendants for the agreed price of the cotton, but it was argued for the defendants that there was a clear case of latent ambiguity, and that evidence might be given to show that there was no *consensus ad idem* because each party meant a different ship, and therefore there was no binding contract.

Decision

The **Court of Exchequer** held that there was no contract, and gave judgment for the defendants.

NOTES

The same rule applies if the parties make a contract under a mutual mistake as to the existence of the subject-matter. Thus, in *Scott v. Coulson*, [1903] 2 Ch. 249, the plaintiffs agreed to sell to the defendants an insurance policy on the life of one Death, both parties believing him to be then alive. The policy was duly assigned, and it was subsequently discovered that Death was dead at the time the contract was made. The Court of Appeal set the contract aside on the ground of mutual mistake.

The test to be applied in cases of this nature is that laid down by BLACKBURN, J., in *Kennedy v. The Panama, New Zealand, and Australian Royal Mail Co., Ltd.*, [1867] L. R. 2 Q. B. 580, 588:—

"The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration."

These words were followed in *Bell v. Lever Bros.*, [1932] A. C. 161, and further explained by Lord ATKIN, at p. 218. Mutual mistake, that is a mistake of both parties to a contract, affects the validity of the contract, if it is "as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be." In other words the mistake must relate to the "identity of the subject-matter" of the contract. In *Bell v. Lever Bros.* an agreement was made between two directors and the company to the effect that the directors should give up their posts so as to facilitate a reorganisation of the concern, and that the company should pay them a certain sum by way of compensation for loss of office. After the money had been paid the company discovered that some years before the directors had engaged in certain transactions which would have entitled the company to dismiss them without notice; at the trial the directors were acquitted of any charge of fraud. The company claimed the return of the compensation as money paid under mistake. But the House of Lords, applying the rules laid down above, dismissed the claim. Lord ATKIN laid down, at p. 223:—

"Is an agreement to terminate a broken contract different in kind from an agreement to terminate an unbroken contract, assuming that the breach has given the one party the right to declare the contract at an end? I feel the weight of the defendant's contention that a contract immediately determinable is a different thing from a contract for an unexpired term, and that the difference in kind can be illustrated by the immense price of release from the longer contract as compared with the shorter. . . . But, on the whole, I have come to the conclusion that it would be wrong to decide that an agreement to terminate a definite specified contract

is void if it turns out that the agreement had already been broken and could have been terminated otherwise. The contract released is the identical contract in both cases, and the party paying for the release gets exactly what he bargains for. It seems immaterial that he could have got the same result in another way, or that if he had known the true facts he would not have entered into the bargain. . . .”

It should be observed that if the service agreement between the directors and the Company had provided that the agreement should terminate *ipso facto* with the breach of its terms by the directors, any contract for compensation would have been void on the ground of mistake, because then the contract would have been not determinable but terminated. Clearly, a terminated contract and a valid contract are not, in the words of Lord ATKIN, “identical,” and the company would have succeeded.

Bell v. Lever Bros., is also an important authority for another proposition, namely that a service agreement is not a contract *uberrimae fidei*; therefore a servant need not make full disclosure of all relevant facts to the master, as is the case with contracts of insurance, *infra*, p. 235.

KITCHIN v. HAWKINS
(1866), L. R. 2 C. P. 22.

Where a party enters into a contract under a mistake of law, he cannot as a rule repudiate the contract, but remains bound by it.

Facts of the Case

The defendant, a corn and seed merchant at Belper, being in financial difficulties, called a meeting of his creditors, at which he offered a composition of 10s. *od.* in the pound, to be paid in two instalments of 5s. *od.* each. The plaintiffs were creditors, but did not assent to this arrangement. A deed of composition was prepared in accordance with the Bankruptcy Act then in force, and accepted by the majority of the creditors.

Subsequently the defendant sent to the plaintiffs a draft for the first instalment, and enclosed a letter, in which he said:—

“The deed of composition for securing my creditors 10s. *od.* in the pound upon their debts is now completed and has been registered, thus binding all the creditors.”

The plaintiffs kept the draft and received the money, but made no acknowledgment. Later they received, and kept, the second instalment also, without sending any acknowledgment.

Shortly afterwards the Court of Exchequer decided that the deed was void against non-assenting creditors. The plaintiffs then claimed the balance of their debt, contending that, in view of the defendant's letter, the composition had been received by them under a mistake of fact.

Decision

The **Court of Common Pleas** held that the plaintiffs had accepted the composition under a mistake of law, and were, therefore, bound by their agreement.

WILLES, J., said:—

"A deed of composition was prepared which, until the decision of Lord WESTBURY in *Re Smith and Layton, Ex parte Cockburn* (1864), 33 L. J. Bey. 17, and of the Court of Exchequer in *Chesterfield and Midland Silkstone Colliery Co., Ltd. v. Hawkins* (1865, 34 L. J. Ex. 121), came to the knowledge of the parties, was supposed to comply with all the provisions of the 192nd section of the Bankruptcy Act, 1861. The defendant in the meantime paid the two instalments of the composition, intimating to the plaintiffs at the time that the money was paid as the composition agreed on by the deed. The plaintiffs took the money and returned no answer, and six months after the second payment was made, they insisted upon being paid the rest. The justice of the case is, that having accepted a composition in the ordinary way, the plaintiffs should be bound by it. Then, does the Statute make any difference? I think not. It only shows that the parties were under a wrong impression when the money was paid and received as a composition. A mistake of fact might have avoided the transaction, but here was no mistake of fact, but only a mistake upon a nice point of law. The just conclusion from the facts is that the payment and acceptance of the money, even under the erroneous impression that the deed was valid, discharged the defendant."

NOTES

Similarly, money paid under a mistake of law cannot be recovered back, as in *Holt v. Markham*, [1923] 1 K. B. 504, where M., an officer in the Royal Air Force, was paid a larger gratuity than that to which he was entitled, through the overlooking of one of the regulations dealing with gratuities. This case raises questions of quasi-contract which are outside the scope of this volume.

But the Court will not allow any of its officers (as, for instance, a trustee in bankruptcy) to retain money paid to him under a mistake of law. (See *Ex parte James, Re Condon* (1874), 9 Ch. App. 609.) This principle has been extended, and the Court will not allow a trustee

in bankruptcy, or a liquidator, to retain money paid by a third party to the bankrupt, or to the company, or provided by a third party for the benefit of the bankrupt or company, where the circumstances are such that it would have been inequitable for the bankrupt or company themselves to have retained it as against the party who paid or provided it.

It should be observed that an error as to a private right is regarded as a mistake of fact, and consequently avoids the agreement. Thus in *Cooper v. Phibbs* (1867), L. R. 2, H. L. 149, a person took a lease of a fishery. Later he discovered that the fishery had always been his property and that, when the lease was granted, he mistakenly believed that it was not his already. On these facts it was held that he was not bound by the agreement. Lord WESTBURY said, at p. 170:—

“ It is said, ‘ *Ignorantia juris haud excusat* ’; but in that maxim the word ‘ *Jus* ’ is used in the sense of denoting general law, the ordinary law of the country. But when the word ‘ *Jus* ’ is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be a result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake. Now, that was the case with these parties—the respondents believed themselves to be entitled to the property, the petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand.”

See Stevens’ Elements of Mercantile Law, 10th Edn., pp. 118 *et seq.*

AGENCY

RATIFICATION

KEIGHLEY, MAXSTED & CO. v. DURANT,
[1901] A. C. 240

There can be no ratification of a contract where the party whose act is to be ratified made the contract without purporting to act as an agent.

Facts of the Case

Roberts, a corn merchant, was authorised by the appellants, K., M. & Co., to buy wheat on a joint account for himself and them

at a certain price. He failed to buy at the agreed price, but later (without any authority from the appellants) contracted with the respondent Durant to buy wheat from him at a higher price. He made the contract in his own name, and made no mention of K., M. & Co., but subsequently agreed with them to take it on a joint account.

Roberts and the appellants (K., M. & Co.) failed to take delivery and Durant resold the wheat at a loss. He sued both Roberts and K., M. & Co. for the amount he had lost.

Decision

The **House of Lords** held that the appellants could not be held to have ratified the contract, as Roberts did not profess at the time to be acting on behalf of a principal.

Lord MACNAUGHTEN said:—

"As a general rule, only persons who are parties to a contract, acting either by themselves or by an authorised agent, can sue or be sued on the contract. A stranger cannot enforce the contract, nor can it be enforced against a stranger. That is the rule; but there are exceptions. The most remarkable exception, I think, results from the doctrine of ratification as established in English law. That doctrine is thus stated by TINDAL, C.J., in *Wilson v. Tumman* (1843), 6 M. & G., at p. 242: 'That an act done, for another, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or on a contract, to the same effect as by and with all the consequences which follow from the same act done by his previous authority.' And so, by a wholesome and convenient fiction, a person ratifying the act of another, who, without authority, has made a contract openly and avowedly on his behalf, is deemed to be, though in fact he was not, a party to the contract. Does the fiction cover the case of a person who makes no avowal at all, but assumes to act for himself and for no one else? . . . Ought the doctrine of ratification to be extended to such a case? On principle I should say certainly not."

KELNER v. BAXTER

(1866), L. R. 2 C. P. 174

A contract cannot be ratified by a principal who was not in existence at the time the contract was made.

Facts of the Case

The formation of a hotel company to be called the Gravesend Royal Alexandra Hotel Company, Ltd., was under consideration, and the proposed directors bought from the plaintiff (a wine merchant) the Assembly Rooms at Gravesend. Until the company was floated, the plaintiff acted as manager of the hotel, and he purchased additional stock for the purpose, and on January 27th, 1866, he offered to sell the same to the defendants on behalf of the company for £900, and the defendants signed the following memorandum at the foot of a schedule of such stock, namely :—

“ To MR. JOHN KELNER,—

“ SIR,—We have received your offer to sell the extra stock as above, and hereby agree to and accept the terms proposed.

J. D. BAXTER,
N. J. CALISHER,
J. DALES.

“ On behalf of the Gravesend Royal Alexandra Hotel Company, Limited.”

In pursuance of this agreement the stock was handed over to the proposed company and used in the business of the hotel.

On February 1st, 1866, the directors of the proposed company ratified this arrangement. The company was incorporated on February 20th, 1866, but collapsed, and the plaintiff sued the defendants for the price of the said stock. After this action had been commenced the company itself purported also to ratify the above contract of January 27th.

The defendants pleaded that they had only acted as agents for the company.

Decision

It was held by the **Court of Common Pleas** that the defendants were personally liable for the goods; and that the ratification of the company could not relieve them from liability without the consent of the plaintiff, because the company was not in existence

at the date of the contract of January 27th, 1866, and there could be no ratification by a principal not in existence at the date of the contract, and the Court also refused to hear evidence to show that the defendants had never intended to become personally liable.

In his judgment, ERLE, C.J., said:—

"I agree that if the Gravesend Royal Alexandra Hotel Company had been an existing company at this time" (that is January 27th, 1866) "the persons who signed the agreement would have signed as agents of the company. But as there was no company in existence at the time, the agreement would be wholly inoperative unless it were held to be binding on the defendants personally. The cases referred to in the course of the argument fully bear out the proposition that, where a contract is signed by one who professes to be signing 'as agent,' but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby, and a stranger cannot by a subsequent ratification relieve him from that responsibility. When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time, but no rights or obligations by reason of anything which might have been done before. It was once, indeed, thought that an inchoate liability might be incurred on behalf of a proposed company, which would become binding on it when subsequently formed; but that notion was manifestly contrary to the principles upon which the law of contract is founded."

NOTES

Where a company is being formed and the promoters desire, before the actual incorporation of the company, to enter into a contract for the benefit of the embryo company (such as a contract with the owner of property for the sale and purchase thereof) it is now customary for the promoters or one of them to make the contract, and to insert an express provision in the contract that if the proposed company is duly incorporated and takes over the benefit of the contract and discharges the consideration payable under the same, then the promoter so making the contract is to cease to be liable upon the contract, and that if the company is not incorporated, or does not take over the benefit of the contract, and discharge the consideration within a fixed time, then also the promoter so making the contract is to cease to be liable upon it.

This case is also of importance in Company Law, and reference should be made to p. 150, *infra*, to the related case of *Eley v. Positive Government Security Life Assurance Co.* (1876), 1 Ex. D. 88, *infra* p. 158, as well as to Stevens' Elements of Mercantile Law, 10th Edn., p. 228.

REVOCATION OF AUTHORITY

CARMICHAEL'S CASE,

[1896] 2 Ch. 643

Where an agreement is made, for consideration, whereby an authority is given for the purpose of securing some benefit to the person receiving the authority, the latter is irrevocable.

Facts of the Case

A limited company was formed to purchase certain mining property from Phillips, and Carmichael signed an underwriting contract in respect of the shares to be offered to the public for subscription. This contract, contained in a letter to Phillips, provided: Carmichael would subscribe for 1,000 shares. If, however, members of the public applied for 60,000 shares none should be allotted to him, and if fewer than 60,000 applications were received Carmichael would take up a proportion of the 1,000 shares subscribed in proportion to the deficiency in the applications from the public. In any event he was to receive a commission in consideration for his underwriting. Carmichael finally agreed that this contract and the authority it gave to Phillips to apply for shares on his behalf should be irrevocable. Phillips replied accepting the terms of Carmichael's letter. A few days after the company was registered Carmichael repudiated his underwriting agreement in letters to Phillips and the company secretary. Nevertheless, Phillips used the authority and applied on Carmichael's behalf for 980 shares—the proper proportion under the underwriting agreement—and on allotment Carmichael was registered as a shareholder. In this action he sued for removal of his name from the register.

Decision

The **Court of Appeal**, affirming **STIRLING, J.**, refused to remove Carmichael's name from the register, and held that his first letter to Phillips constituted an authority to Phillips coupled with an interest, and that the agreement contained in such letter was irrevocable.

In his judgment, **LOPES, L.J.**, said, at p. 648:—

"The question in this case is whether the company had authority to allot these shares to Mr. Carmichael. That question

depends on whether the authority given to Phillips, who was the vendor, was revocable or not. If it was an authority coupled with an interest it would be irrevocable. The question that really arises is whether in this case it is an authority coupled with an interest. I think the answer is a very short and a very complete one. What was the object? The object was to enable Mr. Phillips, the vendor, to obtain his purchase-money, and in the language of WILLIAMS, J., it therefore conferred a benefit on the donee of the authority. I think therefore the judgment of STIRLING, J., is perfectly right, and that Mr. Carmichael is a member of the company and is not entitled to have his name struck out."

NOTES

The words of WILLIAMS, J., referred to in the judgment were spoken in *Clarke v. Laurie* (1857), 2 H. & N. 199; they read:—

"What is meant by an authority being coupled with an interest being irrevocable is this—that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable."

The authority must be given to the agent in order to furnish a security. The ordinary case where the agent receives a consideration, such as a salary or commission, does not furnish a case of his authority being coupled with an interest.

See also Stevens' Elements of Mercantile Law, 10th Edn., p. 146.

COMMISSION

TRIBE v. TAYLOR (1876), 1 C. P. D. 505

The agent is entitled to commission only in respect of bargains which are the direct result of his agency.

Facts of the Case

The defendant was in want of additional capital for his business. In June, 1873, he wrote to the plaintiffs, who were accountants : "The land and premises of the Britannia Works in this town are my property solely, but the business is carried on by myself and my partner. In case of your introducing a purchaser of all the

premises, or part of them, of whom I shall approve, or in case of your introducing capital which I should accept, I could pay you a commission of 5 per cent. on the amount in either case, provided no one else is entitled to a commission in respect of the same introduction." The plaintiffs introduced one Wood, who advanced £10,000 by way of loan, and were paid the agreed commission. In December, 1874, the defendant and Wood entered into partnership, and under this agreement Wood advanced another £4,000. The plaintiffs claimed commission also on the second advance. However, they admitted at the trial that the second advance was not contemplated at the time of the first one, and that it was so advanced in consequence of the negotiation for partnership between the defendant and Wood.

Decision

The action was dismissed. On the facts the plaintiffs had not earned the commission in respect of the second advance.

BRETT, J., said, at p. 509:—

"The true construction of this contract, as it seems to me, is, that the plaintiffs are to have a commission of 5 per cent. for the introduction by them of capital into the defendant's business at any time after the date of the contract. I do not think the agreement to pay commission is confined to advances made in any particular time or to an advance of one amount; but I think it applies to advances at any number of times. Nor do I think it is confined to capital introduced in any particular form; but it applies equally to advances by way of loan and to advances in the shape of a partnership. The question which arose at the trial was this, whether the advance of the £4,000 was the result of any act of the plaintiffs. If in December, 1874, the plaintiffs had introduced any new person, who had advanced the money, I should have thought the defendant would have been bound to pay them the commission claimed. If they had induced Wood to become a partner and to introduce further capital, I should have thought they would have been entitled to commission on that. But I think Mr. Bremner (counsel for the plaintiffs) was right in saying that the question is whether the partnership was caused by any act of the plaintiffs. Now, the only act they do is the original act of introduction which led to the advance of £10,000. Was the subsequent partnership the result of the introduction or of an independent negotiation between the defendant and Wood? *Causa proxima* is not the question: the plaintiffs must show that some act of theirs was the *causa causans*. . . . I think the admission must be interpreted as meaning that the partnership was brought about by an original agreement between the defendant and Wood, and not by the act

or intervention of the plaintiffs. It is true that the advance of the £4,000 might not, and probably would not, have been made by Wood, but for the original introduction by the plaintiffs. But that is not enough, I think the plaintiffs have not brought the advance of the £4,000 within the contract declared on."

NOTES

There are two conditions for the agent receiving remuneration, viz. (i) the bargain made between the principal and the third party must have resulted from his agency; (ii) the bargain the agent has brought about must have been within the scope of his employment. The case of *Tribe v. Taylor* deals only with the first condition which gives rise to many difficulties. Whether particular transactions have resulted from the agency may be doubtful not only in respect of agreements entered into after the work of the agent had come to an end, commonly known as repeat orders, one type of which is represented by *Tribe v. Taylor*, but also when the same introduction was due to the services of more than one agent.

The difficulties arise from the, perhaps necessarily, vague term "direct" intervention of the agent.

(a) With regard to repeat orders the position seems to be this:— Such an order will be regarded as a direct result of the original agency, if in the contract between principal and agent the parties contemplated that repeat orders would be given, and that the agent should receive remuneration for them. See LINDLEY, J., in *Tribe v. Taylor*, and the judgment of PICKFORD, J., in *Bickley v. Browning, Todd, & Co.* (1913), 30 T. L. R. 134. In the latter case an important distinction was made: an agent was in any event held entitled to commission on bargains introduced by him, but not closed by the time the agency ended; new contracts however entered into after such date with customers introduced by him did not carry commission unless the agent proved that his contract with the principal gave him that right. Thus where in a contract between principal and agent the principals agreed "to allow him commission upon all orders executed by them and paid for by the customers arising from his introduction," LOPES, L.J., held that the agent was entitled to commission on orders coming in after the agency had terminated, *Bilbee v. Hasse & Co.* (1889), 5 T. L. R. 677.

(b) As regards several agents introducing the same customer, we may note the following cases:—In *Bow's Emporium v. Brett* (1927), 44 T. L. R. 194, the first agent had supplied the principal with confidential information about the purchase of another business. Later the principal, acting on this information, employed a second agent, who eventually negotiated the sale. In these circumstances the House of Lords held that the first agent was entitled to commission, since his services had directly, if not immediately, resulted in the formal transaction, in other words, his services had been really instrumental

in bringing about the sale. On the other hand, in *Gibson v. Crick* (1862), 31 L. J. Ex. 304, the defendants were shipowners and instructed the plaintiff, a broker, to find a charterer. The plaintiff introduced another broker, L., who introduced a person who eventually chartered the vessel. On those facts the Court held that the plaintiff had not earned the commission, because his services were too remotely connected with the conclusion of the charterparty.

As regards the (ii) condition, *supra*, this may be illustrated by *Toulmin v. Millar* (1887), 58 L. T. 96, where the House of Lords held that an agent employed to let an estate, and procures a tenant who subsequently buys it, is not entitled to commission on the sale. See also *Mote v. Gould* (1935), 152 L. T. 347, a rather hard case, which may not in future be followed.

See Stevens' Elements of Mercantile Law, 10th Edn., p. 157.

ANDREWS v. RAMSAY & CO.,
[1903] 2 K. B. 635

If an agent receives a secret profit he must account for it to his principal, and if he receives it fraudulently he also forfeits his right to commission in respect of the transaction in connection with which the corrupt bargain was made.

Facts of the Case

The plaintiff instructed the defendants, who were auctioneers and estate agents, to find a purchaser for certain property belonging to the plaintiff at the price of £2,500, and agreed that if the defendants sold at that price, he would pay them £50 commission. Later, the plaintiff agreed, through the defendants, to sell the property to C. for £2,100, the defendants saying that was the best price they could get. Thereupon C. paid £100 deposit to the defendants, of which they paid over £50 to the plaintiff, and retained the remaining £50, with the plaintiff's consent, as commission due to them. It subsequently transpired that C. and the defendants had had previous transactions with respect to sales of property and that in this case C. had paid £20 to the defendants as commission. The plaintiff sued the defendants to recover this secret commission of £20 and the defendants paid that amount into Court and it was paid over to the plaintiff. The plaintiff then brought the present action in the Clerkenwell County Court to recover from the defendants the £50 retained by them as commission, and the County Court Judge gave judgment for the plaintiff for that sum. The defendants appealed.

Decision

It was held by the **Divisional Court** that the plaintiff was entitled to recover the £50 from the defendants.

In his judgment Lord ALVERSTONE, C.J., said :—

" It seems to me that this case is only an instance of an agent who has acted improperly being unable to recover his commission from his principal. It is impossible to say what the result might have been if the agent in this case had acted honestly. It is clear that the purchaser was willing to give £20 more than the price which the plaintiff received, and it may well be that he would have given more than that. It is impossible to gauge in any way what the plaintiff has lost by the improper conduct of the defendants. I think, therefore, that the interest of the agents here was adverse to that of the principal. A principal is entitled to have an honest agent and it is only the honest agent who is entitled to any commission. In my opinion if an agent directly or indirectly colludes with the other side and so acts in opposition to the interest of his principal, he is not entitled to any commission."

NOTES

Where an agent has received a secret profit, because he honestly believed that he was entitled to it as a trade discount, and not in connection with his main duty as agent, then he is still bound to account to his principal for such profit, but he does not forfeit his commission. (See *Hippisley v. Knee Bros.*, [1905] 1 K. B. 1.)

In the case of *Hippisley v. Knee Bros.*, some auctioneers who were instructed to sell goods for their principal, debited him with the gross amount of the printers' bills and advertising expenses, whereas in fact they had been allowed discounts in respect of both items. There was evidence of a general custom for printers and newspaper proprietors to allow auctioneers the usual trade discounts, which discounts would not be allowed to the auctioneers' customers if they dealt with them direct, and in this case the auctioneers honestly thought they were entitled, under that custom, to keep the discounts themselves. Under these circumstances the court decided that though the auctioneers could not debit their principal with the gross amounts of the bills for printing and advertising, because by their contract they were only to be paid their actual out-of-pocket expenses, nevertheless as they had not acted fraudulently and as the duty to account correctly for their out-of-pocket expenses was merely incidental to, and separable from, their main duty of selling the goods, they had not forfeited their right to retain their commission.

So, also, where the transactions of an agent on behalf of his principal can be separated and the agent has acted honestly in some of them, but in others he has acted dishonestly and received secret

profits, he must still account to his principal for all the secret profits, and will also lose his commission in respect of the dishonest transactions—but he will not forfeit his commission in the instances in which he has acted honestly. (See *Nitedals Taendstikfabrik v. Bruster*, [1906] 2 Ch. 671).

See Stevens' Elements of Mercantile Law, 10th Edn., pp. 151 *et seq.*

WARRANTY OF AUTHORITY

COLLEN v. WRIGHT

(1857), 8 E. & B. 647

Where a person represents himself as having an authority as an agent which he does not possess in fact, he is liable for damages to anyone who is induced to contract with him as such agent, even though he (the agent) honestly believes he has such authority.

Facts of the Case

Wright was land agent for Gardner, and, as such, he made an agreement with the plaintiff for the lease to him for 12½ years of a farm belonging to Gardner. A formal agreement was drawn up and signed by Wright as agent for Gardner, and it was also signed by the plaintiff. The plaintiff entered on the farm on the strength of this agreement. Gardner refused to execute the lease to the plaintiff and alleged that Wright had no authority to agree to a lease for so long a period or on the terms arranged. This proved to be correct, but Wright honestly believed at the time he made the agreement that he was so authorised. The plaintiff now sued the defendants as executors of Wright (since deceased) for damages sustained by the plaintiff by reason of a breach of warranty by Wright that he had authority to act on Gardner's behalf in making the agreement for the lease.

Decision

It was held by the Court that the plaintiff was entitled to recover damages against the defendants as W.'s executors.

In his judgment in the **Court of Exchequer Chamber**, WILLES, J., said, at p. 657:—

“I am of opinion that a person, who induces another to contract with him as the agent of a third party by an unqualified

assertion of his being authorised to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue. This is not the case of a bare misstatement by a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorised, that that authority which he professes to have does in point of fact exist."

NOTES

The position is the same where an agent originally had authority to act on behalf of a principal, but by reason of the death or lunacy of the principal, that authority has ceased to exist. In such cases, if the agent continues to act, even though he does not know of the death or lunacy of his principal, he will nevertheless be liable in damages to the persons who have been induced to contract with him as such agent. (See *Yonge v. Tynbee*, [1910] 1 K. B. 215.)

On the other hand, the person contracting with an agent who acts without authority, has no claim against the agent where such person is aware of the absence of authority, or where at the time of the contract the agent has expressly disclaimed any present authority. (See *Halbot v. Lens*, [1901] 1. Ch. 344.)

The principle of the case of *Collen v. Wright* is not confined to cases where a professing agent purports to make a contract on behalf of a principal, but has been extended to other cases. Thus, in the case of *Starkey v. Bank of England*, [1903] A. C. 114, a broker applied to the Bank of England for a power of attorney for the sale of consols, believing himself to have instructions from the stockholders to do so, and when the power of attorney had been signed, as he believed, by the stockholders, he lodged it at the bank and executed the transfer of the consols to a purchaser, under the provisions of the power of attorney, whereupon the bank transferred the consols into the name of the purchaser. It was later discovered that the power of attorney was a forgery, and the bank was compelled to make good the loss of the consols so transferred. The bank then sued the broker, and the Court held that he had impliedly warranted that he had authority to act and was therefore liable to indemnify the bank against the loss sustained by them in making good the loss of the consols.

So, also, in the case of the *Lord Mayor, etc., of Sheffield v. Barclay*, [1905] A. C. 392, it was held that bankers who innocently presented

a forged transfer to a Corporation and thereby induced the Corporation to transfer some stock into new names, were liable to indemnify the Corporation against any loss, on the ground that they impliedly warranted that the transfer was genuine.

And in the case of the *Bank of England v. Cutler*, [1908] 2 K. B. 208, a broker was similarly held liable to indemnify the Bank of England against any loss suffered by them, in a case where he innocently identified a certain person to the bank as being the registered holder of some stock, and it was later discovered that that person was not the real holder but had fraudulently personated the holder and had also forged a transfer in the name of the true holder, without any knowledge on the part of either the bank or the broker.

Statements of this kind are warranties in the sense discussed in *De Lassalle v. Guildford*, [1901] 2 K. B. 215, set out fully *supra*, p. 64. Implied warranties of this kind often supply a remedy in cases where the false representation has been made innocently, or where it is not possible to prove fraud.

See Stevens' Elements of Mercantile Law, 10th Edn., p. 164.

LIABILITY OF PRINCIPAL

WATTEAU v. FENWICK,

[1893] 1 Q.B. 346

A principal is liable upon contracts made by his agent which are within the scope of the apparent authority of an agent of that particular character even though the principal has not held the agent out as his agent and the agent has in fact made the particular contracts in his own name.

Facts of the Case

The defendants were a firm of brewers and they purchased the business of a beerhouse known as the Victoria Hotel at Stockton-on-Tees. They employed Humble as their manager of the business. The licence was always taken out in Humble's name, and his name was painted over the door. By the terms of the agreement made between Humble and the defendants, he had no authority to buy any goods for the business except bottled ales and mineral waters. All other goods required were to be supplied by the defendants themselves. This action was brought to recover the price of goods supplied by the plaintiff to the Victoria Hotel, consisting of cigars, bovril and other articles. The plaintiff admitted he gave credit to Humble only, for the goods supplied.

Decision

The **Divisional Court** allowed the plaintiff's claim against the defendants for the cigars and bovril.

In the course of his judgment, WILLS, J., said, at p. 348:—

"I think that the Lord Chief Justice during the argument laid down the correct principle, viz., once it is established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies—that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said it is only so where there has been a holding out of authority—which cannot be said of a case where the person supplying the goods knew nothing of the existence of a principal. But I do not think so. . . . In the case of a dormant partner it is clear law that no limitation of authority as between the dormant and active partner will avail the dormant partner as to things within the ordinary authority of a partner. The law of partnership is, on such a question, nothing but a branch of the general law of principal and agent, and it appears to me to be undisputed and conclusive on the point now under discussion."

NOTES

Of course, if the party dealing with an agent is aware of certain limitations put upon the agent's authority by the principal, then the position will be different and the party dealing with the agent is then bound by his knowledge of such limitations and cannot recover against the principal upon a contract made by the agent which is contrary to those limitations.

But where the other party to the contract is not aware of such limitations of authority, and the particular contract is within the scope of the apparent authority of the agent who makes it, then the other party may sue the principal of the agent upon the contract even though in fact the agent has made the contract in his own name.

Where a party making a contract is not an agent at all, or though he is an agent yet the particular contract is one which he has no authority to make and is also outside the scope of his apparent authority, in such cases a third person may afterwards ratify the contract and so make himself liable upon it as a principal by ratification, although at the time of the contract the party making the contract had no authority whatever to make it on behalf of such principal—but this does not apply where the person making the contract has made it in his own name as principal. There cannot be a ratification in such case. See *Keighley Maxted & Co. v. Durant*, [1901] A. C. 240, dealt with on pp. 110 *et seq.*

LLOYD v. GRACE, SMITH & CO.,

[1912] A.C. 716

A principal is liable for the tortious acts of his agent committed within the scope of his authority, whether they are committed for the benefit of the principal or for the agent's own benefit.

Facts of the Case

Mrs. Lloyd, a widow, owned two freehold cottages and also a sum of £450 which she had lent out on mortgage. Grace, Smith & Co. were a firm of solicitors in Liverpool, and on January 11th, 1910, Mrs. Lloyd called at their office to consult them, as she was not satisfied with the income she was receiving. At the office she saw one Sandles, who was the firm's conveyancing manager and managing clerk. He conducted the firm's conveyancing work without supervision and had authority to arrange and negotiate sales and carry them out and to receive deeds for safe custody. Mrs. Lloyd did not know Sandles and believed him to be a member of the firm. He asked her to call again and bring her deeds. On January 12th, 1910, she called again and on the advice of Sandles she gave him instructions to sell the two cottages and to call in the mortgage-money of £450. She left her deeds with him and he gave her a receipt for them in his own name. During this same interview Sandles got Mrs. Lloyd to sign two documents. She did not read them through, nor did he read them to her, or explain them, and she believed that they were documents which she had to sign before the sale could proceed. In fact, the two documents were a conveyance by Mrs. Lloyd to Sandles of the two cottages and a transfer to him of the mortgage for £450. On January 13th, Sandles mortgaged the two cottages to a bank to secure a personal loan to himself, and he also gave notice to the mortgagor of the transfer of the mortgage to himself and called in the mortgage money, £450. On January 17th, Mrs. Lloyd saw Sandles again in the firm's office. He told her he had already called in the mortgage. He also advised her to leave her deeds with him and said "They will be quite safe with us." Mrs. Lloyd told him not to go on with the sale of the cottages and asked for a receipt for the deeds in the name of the firm, which he gave her. On April 5th, 1910, Sandles transferred the mortgage for £450 to someone else and used the money to pay a private debt of his own. The fraud of Sandles was discovered about the end of April, and in May the proprietor of the firm G., S. & Co. saw Mrs. Lloyd and said Sandles

had paid £250 towards the amount owing on the mortgage of the two cottages which Sandles had executed to the bank on January 13th, and he (the proprietor of the firm) offered to lend Mrs. Lloyd the balance required to pay off the bank. This he did, and he then retained the deeds himself as security for such balance. Mrs. Lloyd now sued the firm of G., S. & Co. for delivery to her of the deeds of the two cottages and also for payment to her of the sum of £450 in respect of the original mortgage in her name. No imputation was cast upon the honour of the proprietor of the firm.

Decision

On appeal to the **House of Lords** it was held that Grace, Smith & Co. were responsible for the frauds of Sandles, as they were committed by him while he was acting as their agent and within the scope of his authority (or in the course of his employment) as such agent, and G., S. & Co. were therefore liable to Mrs. Lloyd although the frauds were committed by Sandles for his own benefit and not for the benefit of the firm.

In the course of his speech in the **House of Lords**, Earl LOREBURN, L.C., said:—

“ It is clear to my mind, upon these simple facts, that the jury ought to have been directed, if they believed them, to find for the plaintiff. The managing clerk was authorised to receive deeds and carry through sales and conveyances and to give notices on the defendants' behalf. He was instructed by the plaintiff, as the representative of the defendant's firm—and she so treated him throughout—to realise her property. He took advantage of the opportunity so afforded him as the defendant's representative to get her to sign away all that she possessed and put the proceeds into his own pocket. In my opinion there is an end of the case. It was a breach by the defendant's agent of a contract made by him as defendant's agent to apply diligence and honesty in carrying through a business within his delegated powers and entrusted to him in that capacity. It was also a tortious act committed by the clerk in conducting business which he had a right to conduct honestly and was instructed to conduct, on behalf of his principal.

And Lord MACNAGHTEN in the course of his speech referred to a judgment of Lord BLACKBURN in an earlier case and said:—

“ And then come these important words 'The substantial point decided was, as I think, that an innocent principal was civilly responsible for the fraud of his authorised agent acting within his authority, to the same extent as if it was his own fraud.' That, my Lords, I think is the true principle. It is, I think, a mistake to qualify it by saying that it only applies

when the principal has profited by the fraud. I think, too, that the expressions 'acting within his authority,' 'acting in the course of his employment' and the expression 'acting within the scope of his agency' (which Story uses), as applied to an agent, speaking broadly, mean one and the same thing."

NOTES

Where an agent commits a tortious act within the scope of his authority or in the course of his employment the agent, as well as the principal, is liable for such act. But the agent will be entitled to be indemnified by his principal against such liability, where the tortious act is one which is not manifestly unlawful and he has committed it innocently and on the instructions of his principal, as where an agent seizes or sells goods improperly, but he does so in good faith and on the express orders of his principal. (See *Toplis v. Grane*, (1839), 5 Bing. N. C. 636; *Betts and Drewe v. Gibbins*, (1834), 2 A. & E. 57.)

On the other hand, when the tortious act of a servant or agent is outside the scope of his employment or authority, the master or principal is not liable. Thus in *Cheshire v. Bailey*, [1905] 1 K. B. 237, a silversmith hired a brougham and coachman to take travellers round the town with their goods. While the traveller called at a house, the coachman, acting in conspiracy with thieves, drove away and the goods were stolen. It was held that the coachman's master was not liable, because the coachman was acting outside his employment. The decision would probably have been the other way if the goods had been entrusted to the coachman by his master and then stolen, for in such circumstances the theft would have been in the scope of the servant's employment.

DE BUSSCHE v. ALT

(1878), 8 Ch. D. 286

As a general rule, an agent cannot delegate his authority to someone else—"Delegatus non potest delegare."

Facts of the Case

The plaintiff, an English shipowner, instructed Gilman & Co., in China, to sell his ship, "The Columbine," for not less than \$90,000. If no sale could be effected at one port she should be sent on with cargo to another one. As Gilman & Co. were unable to sell the vessel in China they sent her on to Japan, and instructed the defendant to effect a sale. The latter, after fruitless attempts to do so, bought her himself for the minimum price, and remitted it through Gilman & Co. to the plaintiff. Later the

De Bussche v. Alt

defendant sold the ship to a Japanese Prince for \$160,000. When the plaintiff heard of his, he sued the defendant for an account, but the latter pleaded that he had never been the plaintiff's agent, since Gilman & Co. had not been entitled to delegate their authority to him.

Decision

It was held by the **Court of Appeal** that the relationship of principal and agent was established between the plaintiff and the defendant, and that such relationship also existed at the time of the purchase and re-sale of the vessel by the defendant, and that the defendant was therefore liable to account to the plaintiff for the profit made by him on the re-sale to the Japanese Prince.

In the course of his judgment in the **Court of Appeal**, THESIGER, L.J., said, at p. 310:—

"The first contention raises a question which, as it appears to us, does not present any difficulty. As a general rule, no doubt, the maxim, *delegatus non potest delegare*, applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim when analysed merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfil; and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed 'a sub-agent' or 'substitute' . . . and on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute; and that when such authority exists, and is duly exercised, privity of contract arises between the

principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself."

NOTES

Modern conditions have whittled away the importance of this principle, but it still exists where personal confidence or special skill is warranted, as in contracts with professional men.

To appreciate the privity of contract between principal and sub-agent *De Bussche v. Alt* must be read in conjunction with *Calico Printers' Association v. Barclays Bank* (1931), 145 L. T. 51. In that case the plaintiffs shipped goods to Beyrouth and employed the defendants to collect the proceeds and make the necessary arrangements for the storage and insurance of the goods. The defendants employed sub-agents. Later the goods were destroyed by fire, when they were uninsured. One of the questions arising in the subsequent litigation was whether privity of contract existed between the principal and sub-agents so that the latter would have to be sued instead of the agents. WRIGHT, J., said in the course of his judgment, at p. 55:—

"To support the argument that there was privity between the plaintiffs and the Anglo-Palestine Bank, reliance was especially placed on a passage from Story on Agency, sect. 201, as establishing a general principle that where the employment of a sub-agent was authorised either by express terms or by a known course of business, or some unforeseen exigency necessitating such employment, there was privity established between the principal and the sub-agent, so that the sub-agent and not the agent became directly responsible to the principal for any negligence or misconduct in the performance of the mandate. But I do not think the English law has admitted any such general principle, but has in general applied the rule that even where the sub-agent is properly employed, there is still no privity between him and the principal; the latter is entitled to hold the agent liable for breach of the mandate, which he has accepted, and cannot, in general, claim against the sub-agent for negligence or breach of duty. I know of no English case in which a principal has recovered against the sub-agent for negligence. The agent does not as a rule escape liability to the principal merely because employment of the sub-agent is contemplated. To create privity it must be established not only that the principal contemplated that a sub-agent would perform part of the contract, but also that the principal authorised the agent to create privity of contract between the principal and the sub-agent, which is a very different matter requiring precise proof. In general, where a principal employs an agent to carry out a particular employment, the agent under-

takes responsibility for the whole transaction, and is responsible for any negligence in carrying it out, even if the negligence be that of the sub-agent properly or necessarily engaged to perform some part, because there is no privity between the principal and the sub-agent."

This rule applies to foreign banking correspondents (*Mackersy v. Ramsays, Bonar & Co.* (1843), 9 Cl. & F. 818), and to clients of a country solicitor and the latter's London agent (*Robbins v. Fennell* (1847), 11 Q. B. 248).

These principles apply to the principal's action of damages and the sub-agent's right to commission; in the ordinary way either right can be enforced only against the agent. The position is different where an equitable remedy is sought. WRIGHT, J., makes this clear when, at p. 56, he distinguishes the *Calico Printers*' case from *De Bussche v. Alt, supra*. The learned judge said: "Apart from the specific finding of fact that there was authority to create direct privity, the case turned on equitable principles; the sub-agent was *pro tanto* in a fiduciary position as regards the secret profits and could not retain them as against the person whom he knew to be entitled, namely, the actual principal. In a later case of a similar character, *Powell and Thomas v. Evan Jones & Co.* [1905] 1 K. B. 11, the Court of Appeal held . . . that in all circumstances there was such a fiduciary relationship as between the sub-agent and the principal as placed the former under a personal incapacity to receive any secret reward."

**MOREL BROS. & CO., LTD. v. EARL OF
WESTMORLAND,**

[1903] 1. K. B. 64; *affirmed*, [1904] A. C. 11

Where husband and wife are living together, there is a presumption that the wife has authority to pledge the husband's credit for necessaries for the household, but this presumption may be rebutted by proof that he has made her a sufficient allowance for such purposes.

Facts of the Case

The plaintiffs brought this action against both the Earl and Countess of Westmorland to recover the price of wines and provisions supplied by them, between May, 1897, and September, 1901, on the order of the Countess, and delivered at the home of the Earl and Countess where they resided together. It was proved that in July, 1899, discussions took place between the Earl and

Countess, and his solicitor, as to monetary matters and as to the question of household expenses and it was arranged that the Earl should set aside out of his income, an allowance of £2,000 a year for household expenses, to be paid into a separate banking account upon which either the Earl or the Countess might draw for such expenses only, and that the Countess should provide for her dress and other personal expenses out of her own separate income of £400 a year, and that she was not to incur any expenses for the household beyond the amount of £2,000 so allowed. The Earl duly paid into the account the amount of £2,000 a year as agreed. The plaintiffs had no notice of this arrangement. Shortly afterwards the Earl provided a sum of £1,200 in part payment of the debts owing prior to the arrangement being made in July, 1899, and the solicitor distributed this sum among the various creditors, the plaintiffs receiving a cheque for £50 on account of the amount due to them down to July, 1899, and they gave credit for this sum in the present action and now claimed the balance of their account (from May, 1897, to September, 1901), against both the Earl and Countess. The Countess did not defend the action and the plaintiffs signed judgment against her and the action proceeded to trial against the Earl alone, who denied his liability for any part of the plaintiffs' claim. The plaintiffs contended that the Earl and Countess were both jointly liable to them.

Decision

On Appeal it was held by the **Court of Appeal** and also by the **House of Lords**, that the Earl and Countess were not jointly liable for the plaintiffs' account, but that the liability was alternative, and that as the plaintiffs had signed judgment against the Countess they could not now recover against the Earl for any part of their claim. The Courts further decided that in view of the arrangement made in July, 1899, the Countess had no authority to pledge the Earl's credit for household expenses after that date, this being an additional bar to the plaintiffs' claim so far as it related to the goods supplied after that date.

In his judgment in the **Court of Appeal**, COLLINS, M.R., dealing with a wife's authority to pledge her husband's credit for necessaries, said, at p. 72 :—

“ I agree that the facts that the defendants had a common establishment, and that goods were supplied by the plaintiffs for the purposes of that establishment upon the order of the wife, would, by themselves, in point of law constitute a *prima facie* case against the husband ; not, as has been well pointed out by the defendant's counsel, as being evidence of a holding out of the wife as his

agent by the husband, but as raising a presumption of authority in point of fact, which is therefore capable of being rebutted by proof of circumstances showing that there was in fact no such authority."

And later, when speaking of the arrangement made between the Earl and Countess in July, 1899, his Lordship continued at p. 73 :—

" The effect of the evidence is, in my judgment, that the arrangement amounted to this, namely, that the Countess should not in future have any authority to pledge the Earl's credit and that a fund should be provided for the household expenditure. . . . It appears to me that this arrangement clearly involves a negation of the wife's having any authority to pledge the credit of her husband at all, and the case exactly comes within the authority of *Debenham v. Mellon* ((1880), 6 App. Cas. 24) and *Jolly v. Rees* ((1864), 15 C. B. (N.S.) 628). The arrangement as to the allowance of £2,000, which I have mentioned, clearly implied, I think, that that fund was to be substituted for any authority of the wife to pledge the husband's credit, which might *prima facie* be presumable from the fact of cohabitation, and therefore negatives the existence of such an authority."

NOTES

Where a husband and wife are living together the presumption which arises, that she has authority to pledge his credit for household necessaries, extends to all reasonable domestic requirements for the household and the family, including the provision of food, clothing, domestic service and other matters ordinarily entrusted to a wife, such goods and services being suitable in kind, sufficient in quantity and necessary in fact according to the condition of life which they enjoy. (See *Miss Gray Ltd. v. Cathcart (Earl)* (1922), 38 T. L. R. 562.) But in deciding what are necessaries, the condition or station in life of the husband and wife must be taken into consideration, and it is the husband who has the right to fix this. (See *Jolly v. Rees* (1864), 15 C. B. (N.S.) 628; *Debenham v. Mellon* (1880) 6 App. Cas. 24.)

The presumption of the wife's authority to pledge the husband's credit which so arises may be rebutted not only by proof that he has made her a sufficient allowance for all reasonable domestic requirements, but also by proof of any of the following facts :—(a) that the husband expressly warned the particular tradesman or claimant not to supply goods or services on credit; (b) that the wife was already supplied with sufficient of the articles or services in question; (c) that the husband had forbidden his wife to pledge his credit; (d) that the order in question was excessive in extent or extravagant, having regard to the husband's income. (See *Miss Gray Ltd. v. Cathcart (Earl)* (1922), 38 T. L. R. 562.) But the presumption of authority will not be rebutted merely by proving that the wife has a separate income of her own, for the husband is still responsible for the maintenance of his wife, although

she may have an ample income of her own. (See *Seymour v. Kingscote* (1922), 38 T. L. R. 586.)

A husband cannot starve his wife by forbidding her to pledge his credit, and at the same time neglecting to provide her with the necessities of life, and in such a case she will become an agent of necessity with power to pledge his credit for all necessities for herself and the household. (See per Lord SELBORNE in *Debenham v. Mellon* (1880), 6 App. Cas. 24, at p. 31, and per BRAMWELL, L.J., same case, (1880), 5 Q. B. D. 394, at p. 398.)

If, though the husband has forbidden his wife to pledge his credit or has kept her adequately supplied with necessities, he nevertheless pays accounts for goods subsequently supplied on her orders, he will by so doing be acknowledging or holding her out as his agent to the particular tradesmen whose accounts he pays, and she will then become his agent for the future in dealing with those tradesmen, unless at the time of paying the accounts he warns the tradesmen not to give her any further credit. (See per Lord BLACKBURN in *Debenham v. Mellon* (1880), 6 App. Cas. 36; *Ryan v. Sams* (1848), 12 Q. B. Cases 460.)

But if a tradesman, knowing a woman to be a married woman, nevertheless gives credit to the woman herself exclusively, and not to the husband, then the husband is not liable. (See *Smith's L. C.*, 13th Edn., Vol. II, p. 461.)

PARTNERSHIP

COX v. HICKMAN

(1860), 8 H. L. Cas., 268

The receipt by a person of a share of the net profits of a business is prima facie evidence of the existence of a partnership, but it is not conclusive evidence, and the other circumstances must also be considered in deciding whether in fact there is a partnership or not.

Facts of the Case

Smith and Smith carried on business as iron masters and corn merchants under the name of B. Smith & Son, down to 1849. Then they got into difficulties and called a meeting of their creditors. Later they executed a deed of arrangement in favour of their creditors, the parties to the deed being S. and S. of the first part, five of the creditors (including Cox and Wheatcroft) of the second part, and the general body of creditors of the third part, and the deed provided that the five creditors of the second part were to carry on the business of S. and S. as trustees for the creditors under

the name or style of "The Stanton Iron Company," and to divide the net income of the business, after paying the expenses, among the general creditors of S. and S., such net income to be deemed to be the property of S. and S. The deed also provided for meetings of the creditors to be held, and that at any such meeting a majority in value of the creditors present was to have power to make rules as to the mode of conducting the business, or to order its discontinuance, and that when all the debts had been paid the trustees were to hold the property assigned under the deed in trust for S. and S. themselves. The deed also contained a covenant by the parties who executed it, not to sue S. and S. for their debts. Cox never in fact acted as a trustee, and Wheatcroft resigned six weeks after the deed, and before the goods for which the bills now sued on were given had been supplied, and no new trustees were appointed in place of Cox and Wheatcroft. The remaining three of the five creditors who were the parties to the deed, of the second part, carried on the business under the provisions of the deed, and goods were supplied to the business by Hickman. In 1855, Hickman drew three bills of exchange for the goods supplied by him, and those bills were accepted on behalf of the Stanton Iron Company by one of the above-mentioned three creditors. Hickman now sued Cox and Wheatcroft on those three bills, and alleged that they were liable upon them as partners in the business of the Stanton Iron Company because they were two of the five creditors who were the original parties to the deed of the second part and had executed the deed accordingly.

Decision

It was held by the **House of Lords** that the deed did not create any partnership, and that therefore Cox and Wheatcroft could not be sued as partners in the business, and they were not liable to Hickman at all.

Lord CRANWORTH said :—

" It is often said that the test, or one of the tests, whether a person not ostensibly a partner, is nevertheless, in contemplation of law, a partner, is, whether he is entitled to participate in the profits. This, no doubt, is, in general, a sufficiently accurate test ; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations and entitled to its profits, or a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade.

The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf, *i.e.*, that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred and under whose management the profits have been made. Taking this to be the ground of liability as a partner, it seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor, or the trustees."

NOTES

The Partnership Act, 1890, has now laid down the law in the same way as this case decided it, and section 2, sub-section (3), of that Act provides (*inter alia*) that the receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does **not of itself** make him a partner in the business—that is to say, it is only *prima facie* evidence, but not conclusive, and all the other circumstances of the case must be taken into consideration.

But in the two following cases it was held that a partnership existed. In *Ex parte Delhasse* (1877), 7 Ch. D. 511, Delhasse advanced to a partnership £10,000 "by way of loan under the 1st section of 28 and 29 Vict., c. 86 (the so-called Bovill's Act, which provided that the loan to a business and the receiving by a lender of a share in the profits should not of itself constitute the lender a partner), and such advance does not and shall not be considered to render the said F. Delhasse a partner in the said business." The contract provided that D. was to receive 25 per cent. of the profits on every 30th June. Delhasse had the right to demand dissolution of the partnership at any time, especially in the event of the death of one of the partners. On the other hand, if Delhasse died, his representatives should not be entitled to withdraw the capital invested in the business. The firm later became bankrupt, and Delhasse proved for the amount of his loan plus interest. The trustee in bankruptcy rejected the proof, and the rejection was upheld by the Court. The true intent and meaning between the parties, and the true legal effect between them were to constitute Delhasse a dormant partner in the business, and therefore he was not entitled to prove in the firm's bankruptcy.

In an earlier case, *Pooley v. Driver* (1876), 5 Ch. D. 458, where a loan was given to a business firm for the same term of years as the partnership was intended to last, and on condition that the lender was given the right of examining the books and of receiving a certain percentage of the yearly profits as well as the amount of his loan plus interest on dis-

solution of the partnership, and where disputes were agreed to be settled by arbitration, the Court held that this contract made the lender a partner in the firm. JESSEL, M.R., said at p. 474 :—

“ If we find an association of two or more persons formed for the purpose of carrying on in the first instance, or of continuing to carry on business, and we find that those persons share between them generally the profits of that business those persons are to be treated as partners in that business, unless there are surrounding circumstances to show that they are not really partners.”

As to the law generally, see Stevens’ Elements of Mercantile Law, 10th Edn., pp. 186 *et seq.*

HAMLYN v. JOHN HOUSTON & CO.,

[1903] 1 K. B. 81

When a partner, acting within the general scope of his authority as such, commits a wrongful act, the other partners are liable for his act as well as himself.

Facts of the Case

The plaintiff was a grain merchant. The defendant firm were also grain merchants, and the firm consisted of Houston and Strong, trading as John Houston & Co. Strong left the conduct of the business to Houston. The plaintiff had a clerk, and one of the terms of his employment was that he should not divulge any secrets relating to his employer’s business. Houston induced this clerk, by bribes, to give him information as to the names of the plaintiff’s customers, and as to contracts made or tendered for by the plaintiff, and also to allow him to have possession of one of the plaintiff’s books containing entries as to contracts. The jury found (among other facts) that it was in the course of the business of the defendant firm to obtain by legitimate means information in regard to the contracts made or tendered for with brewers and with buyers of grains by competing firms.

Decision

It was held that the defendant firm (meaning both the partners therein) were liable to the plaintiff for damages for the action of Houston in having induced the plaintiff’s clerk to break his contract of service by disclosing confidential matters with regard to the plaintiff’s business, whereby damage had been caused to the plaintiff.

In his judgment in the **Court of Appeal**, MATHEW, L.J., said :—

“A little confusion has been introduced into this case by the reference made to the criminal law. It is not suggested that Houston's partner would be liable criminally; the question is only one of civil liability. The rule of law applicable is perfectly plain. The question is whether the action of Houston was within the scope of his authority for the purpose of making the firm liable. I think the jury were entirely warranted in finding that Houston was authorised to obtain information as to the contracts and tenders made by competing firms by legitimate means. He did obtain such information by illegitimate means. It being within the scope of his authority to procure the information, it is immaterial for the present purpose whether the acts which he committed in order to procure it were fraudulent or even criminal or not, and his partner is responsible for those acts.”

NOTES

The Partnership Act, 1890, section 10, provides that where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, the firm is liable therefore to the same extent as the partner so acting or omitting to act.

The case of *Lloyd v. Grace, Smith & Co.*, *supra*, p. 124, should be compared with this one, as partnership is a typical instance of agency.

BAIRD'S CASE

(1870), 5 Ch. App. 725

In the case of a partnership, each partner is the agent of the other partners when acting in connection with and within the scope of the partnership business.

Facts of the Case

A joint stock company known as the Agriculturist Cattle Insurance Company was being wound up. Baird was a shareholder, and some years after his death his sole executrix was placed on the list of contributors as executrix in respect of his shares and subsequently a call was made upon her in respect of such shares.

It was contended for the executrix that Baird was in the position of a partner and that as all partnerships were dissolved by the death of any one partner, his estate and his executrix were not

liable for any debts of the company contracted after his death, but only for those incurred previous to his death.

Decision

On appeal, it was held by Sir W. M. JAMES, L.J., that the principles of partnership did not apply to the case of a joint stock company; that this was not a case of partnership at all; and therefore that Baird's executrix ought to be put on the list of contributors, without any limitation or qualification of liability, except that her name would appear on the list simply in her character of executrix and so as to make her liable for calls made on her to the extent only of the assets of the deceased (Baird).

In his judgment, Sir W. M. JAMES, L.J., after stating that partnerships were essentially different from joint stock companies, went on to make an important pronouncement as to the authority of partners in general, in the course of which he said:—

“ Ordinary partnerships are by the law assumed and presumed to be based on the mutual trust and confidence of each partner in the skill, knowledge, and integrity of every other partner. As between the partners and the outside world (whatever may be their private arrangements between themselves) each partner is the unlimited agent of every other in every matter connected with the partnership business, or which he represents as partnership business, and not being in its nature beyond the scope of the partnership. A partner who may not have a farthing of capital left may take moneys or assets of this partnership to the value of millions, may bind the partnership by contracts to any amount, may give the partnership acceptances for any amount, and may even—as has been shown in many instances in this Court—involve his innocent partners in unlimited amounts for frauds which he has craftily concealed from them. That being the relation between partners, of course, when the Court had to consider whether a partner could substitute or let in some other person for or with him, or whether a partner's executor could claim to succeed to him, there could be no difficulty in saying that this could not be done without the consent of all the partners. The death of a partner, therefore, necessarily put an end to the partnership, so far as he was concerned; and as, in the absence of express stipulation, the right of the representative was to have all the assets realised and divided, it necessarily put an end to the whole subject-matter of the partnership.”

NOTES

It is important to notice the qualification on the implied authority of a partner to bind his firm, viz. that it must be within the actual

or apparent authority. The question of what is a partner's apparent authority may give rise to difficulty, but it is largely a question of fact depending upon the nature of the partnership business. See Partnership Act, 1890, s. 5, and Stevens' Elements of Mercantile Law, 10th Edn., pp. 192 and 198.

A partner has, of course, no right to apply partnership property in discharge or payment of his own private debt without the consent of his co-partners, and if he does so, the person receiving such property must show that he took it without knowledge that it was partnership property; see *Kendal v. Wood* (1871), L. R. 6, Ex. 243, where a partner W. paid £1,000 of partnership money in liquidation of a private debt of his own. His partner K. knew nothing of the partnership money being so used, and had not authorised it, either expressly or by his conduct, but the creditors who received the £1,000 from W. honestly believed that K. had authorised such payment to them. It was held that K. was entitled to recover the £1,000 back from the creditors, as they took it with knowledge that it was partnership property.

AAS v. BENHAM,

[1891] 2 Ch. 244

In all dealings between partners the utmost good faith must be observed.

Facts of the Case

A partner in a stockbroking firm assisted in the formation of a shipping company. In doing so he used information which he had received as a member of the firm. Subsequently he was made a director of the new company at a salary, and his partners claimed that since he had received his new post by virtue of the knowledge acquired in the course of the partnership business he was bound to account to the partnership for the salary he received.

Decision

The **Court of Appeal** held that since the new shipping company could in no way compete with the partnership of stockbrokers no duty to account existed.

LINDLEY, L.J., said at p. 255:—

"The plaintiffs never authorised Mr. Benham to act for the firm in any such matters, and never, in fact, agreed to extend the business of the firm so as to include the bringing out of any company. He never was in fact acting for his firm in this matter, nor did his partners ever suppose he was, or treat him as so acting.

Nor is it true in fact that Mr. Benham or the company for which he was acting ever derived any benefit from his connexion with the firm. . . . It is clear law that every partner must account to the firm for every benefit derived by him without the consent of his co-partners from any transaction concerning the partnership or from any use by him of the partnership property, name or business connexion: but the facts of this case do not bring it within this principle. It is equally clear law that if a partner without the consent of his co-partners carries on business of the same nature as, and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business, but the facts of this case do not bring it within this principle. . . . A partner is not bound to account to his co-partners for profits made by him in carrying on a separate business of his own, unless the case can be brought within one or the other of the two principles to which I have alluded, even if he carries on some separate business contrary to one of the partnership articles. As regards the use by a partner of information obtained by him in the course of the transaction of partnership business, or by reason of his connexion with the firm, the principle is that if he avails himself of it for any purpose which is within the scope of the partnership business, or of any competing business, the profits of which belong to the firm, he must account to the firm for any benefits which he may have derived from such information, but there is no principle or authority which entitles a firm to benefits derived by a partner from the use of information for purposes which are wholly without the scope of the firm's business."

NOTES

A rather curious case that throws more light on the utmost good faith principle is *Green v. Howell*, [1910] 1 Ch. 495. Plaintiff and defendant carried on business as partners in Billingsgate Market. The plaintiff looked after correspondence and accounts, while the defendant did the actual trading. If one partner should commit a flagrant breach of his duties or failed to account for money received the other partner was, under the partnership deed, entitled to determine the association by notice in writing; a dispute whether any particular facts constituted a breach was to be referred to arbitration. Unknown to the plaintiff, the defendant allowed a third party to use the partnership stand at Billingsgate and himself used a smaller stand. He also failed to include in the daily returns transactions carried out at the partnership stand. On becoming aware of this the plaintiff determined the partnership by notice in writing. The defendant disputed the validity of the notice, but did not ask for an arbitration. In this action for a declaration that the partnership had ended the defendant argued that the plaintiff, by serving on him notice of termination before making detailed complaints

and without having given him a hearing, had offended against his duty of exercising utmost good faith so that the notice was invalid. But the Court allowed the action. The plaintiff had acted in good faith, he had been prompted by no improper motive, the defendant's contention was unsound in law, and the notice valid.

Not only partners, agents, too, must account for secret profits, *Andrews v. Ramsay & Co.*, [1903] 2 K. B. 635, *supra*, p. 118. Their relations are in this respect governed by the same principles.

Generally, however, the contract of agency is not a contract *uberrimae fidei*. In *Bell v. Lever Bros., Ltd.*, [1932] A. C. 161, mentioned *supra* p. 107, it was held that persons employed under a service agreement are under no duty to their employer to disclose breaches which they had committed.

Nor are persons negotiating a partnership agreement under any special duty similar to that of a person who applies for an insurance policy, *infra*, p. 235. The special duty of utmost good faith only arises once the partnership has come into existence. In fact, most of the detailed rules, governing the relations between the partners and set out in the Partnership Act, 1890, are derived from this principle. Students are advised to read them with this consideration in mind, particularly the rules in s. 24 of the Act. See Stevens' Elements of Mercantile Law, 10th Edn., p. 202.

TREGO v. HUNT,
[1896] A. C. 7

The vendor of the goodwill of a business is entitled to set up a rival business, but not to canvass or solicit the customers of the old business.

Facts of the Case

In 1876, Trego took Hunt into partnership in his business of a varnish and japan manufacturer on the terms that the goodwill of the business should remain the sole property of Trego himself. He died in 1888, and in 1889 an agreement was entered into between Mrs. Trego and W. and Hunt to carry on the same business in partnership for 7 years from the 1st January, 1889. This agreement provided that the goodwill should remain the sole property of Mrs. Trego. In December, 1894, Mrs. Trego and W. discovered that Hunt had employed a clerk of the firm, out of office hours, to make a copy of the names, addresses and businesses of all the firm's customers. Hunt admitted that his object in making the list was to acquire information which would enable him to canvass these customers, after the partnership had ended, and to endeavour to obtain their custom for himself. Mrs. Trego and

W. therefore sued Hunt to obtain an injunction to restrain him from making any copy of or extract from the partnership books for any purpose except the purposes of the partnership business.

Decision

On appeal to the **House of Lords** it was held that Mrs. Trego and W. were entitled to an injunction restraining Hunt, his partners, servants or agents, from soliciting any customers of the firm to deal with him after the dissolution of the partnership, or not to deal with Mrs. Trego and W.

Lord MACNAIGHTEN said :—

“ My Lords, the question for the House to determine is this : Is a person who has sold the goodwill of his business, or one in the position of the respondent, who has been taken into partnership upon the terms that the goodwill shall belong solely to his partner, at liberty after the sale or the expiration of the partnership (as the case may be) to solicit the old customers of the business ? There can be no difference in principle between the two cases. . . . A person who sells the goodwill of his business is under no obligation to retire from the field. Trade he undoubtedly may, and in the very same line of business. If he has not bound himself by special stipulation, and if there is no evidence of the understanding of the parties beyond that which is to be found in all cases, he is free to carry on business wherever he chooses. But then, how far may he go ? He may do everything that a stranger to the business in ordinary course would be in a position to do. He may set up where he will. He may push his wares as much as he pleases . . . but he must not, I think, avail himself of his special knowledge of the old customers to regain, without consideration, that which he has parted with for value. . . . He may not sell the custom and steal away the customers in that fashion. That at all costs is opposed to the common understanding of mankind and the rudiments of commercial morality, and is not, I think, to be excused by any maxim of public policy. Is it conceivable that the respondent (Hunt) would ever have been taken into partnership if he had hinted at such a manœuvre while negotiations were pending ? It was said that you cannot draw the line ; but I think the line may be drawn at this point.”

NOTES

It will be seen that the legal position is that the vendor of the goodwill of a business is at liberty (subject to any agreement to the contrary) to carry on a similar business in competition with the purchaser, and he may advertise publicly that he is carrying on such business—but he must not canvass or solicit the customers of the old

business. And if he decides, after the sale, to carry on a similar business, he is not at liberty to do this under a name which would suggest that he was still carrying on the old business himself. (See per COZENS-HARDY, J., in *Gillingham v. Beddow*, [1900] 2 Ch. 242.) On the other hand, although he has no right to canvass or solicit the customers of the old business, nevertheless he is at liberty to deal with them if they come to him of their own accord.

Further, this prohibition against the solicitation of the customers of the old business does not apply where a man's business is disposed of under an involuntary alienation, e.g., when it is sold by his trustee in bankruptcy (see *Walker v. Mottram* (1882), 19 Ch. D. 355); or by a trustee under a deed of assignment for the benefit of creditors. (See *Green & Sons (Northampton), Ltd. v. Morris*, [1914] 1 Ch. 562, and *Farey v. Cooper*, [1927] 2 K. B. 384.)

But the rule against solicitation does apply where the executor of a deceased partner is bound by the terms of the partnership deed to sell the goodwill of the partnership business to the surviving partner, and in such case the executor of the deceased partner will be restrained from soliciting the customers of the old partnership firm. (See *Boorne v. Wicker*, [1927] 1 Ch. 667.)

In order to maintain the value of the goodwill the purchaser will usually require the vendor to enter into restrictive covenants as to his future activities. Reference should be made to *Nordenfelt v. The Maxim Nordenfelt Gun & Ammunition Co., Ltd.*, [1894] A. C. 535, *supra*, p. 31, and the notes thereto, p. 34.

SCARF v. JARDINE
(1882), 7 App. Cas. 345

A third party's right to sue a retired partner.

Facts of the Case

Scarf was one of two partners in the firm of W. H. Rogers & Co. When he retired the partnership continued business with a new partner under the old firm's name. Jardine sold goods to the firm without notice of Scarf's retirement. Later, the firm failed to pay, and Jardine, although he had meanwhile heard that Scarf had retired, sued the firm. This subsequently went bankrupt, and Jardine then sued Scarf for the proportion of the purchase price which he had not recovered in the action against the firm.

Decision

On appeal, the House of Lords held that the action failed. A late partner's liability to a third party arises by estoppel only;

it is not a joint liability with the members of the old firm. The customer could elect to sue either the late partner or the new firm. He could not sue all of them. When Jardine sued the new firm, knowing that Scarf had left it, he had exercised his option, and could not now sue the late partner.

Lord SELBORNE, L.C., said, at p. 350:—

“ I am unable to understand how there could have been a joint liability of the three. The two principles (estoppel and the liability of the persons who ordered the goods) are not capable of being brought into play together; you cannot at once rely upon estoppel and set up the facts; and if the estoppel makes A and B liable, and the facts make B and C liable, neither the estoppel nor the facts, nor any combinations of the two can possibly make A, B, and C all liable jointly.” By suing on the facts Jardine had disallowed the estoppel.

Lord BLACKBURN said, at p. 357:—

“ There can be no doubt that Rogers having been partner with Scarf had authority, and apparently continuing authority, to bind Scarf as to all matters concerning the partnership, and that Mr. Jardine being an old customer had a right to believe that that authority continued until he was told that it was revoked. But then I do not think that the liability is upon the ground that the authority actually continues. I think it is upon the ground that there is a duty upon the person who has given that authority, if he revoke it, to take care that notice of that revocation is given to those who might otherwise act on the supposition that it continued; and the failure to give that notice precludes him from denying that he gave the authority against those who acted upon the faith that that authority continued.”

NOTES

The doctrine of estoppel is more fully explained *supra*, p. 91. The rules laid down in this case apply also to the revocation of an agent's authority. If a principal wishes to escape liability after having revoked his agent's authority he must give notice to third parties, and the latter, in the absence of such notice, can elect to sue either the principal or the agent. These instances illustrate the risk which a third party incurs when exercising his option. He must choose before having tested the respective solvency of the two possible defendants.

COMPANIES

NATURE OF A COMPANY

SALOMON *v.* SALOMON & CO., LTD.,

[1897] A. C. 22

A company duly registered under the Companies Acts is a separate legal entity, and a distinct person from the shareholders, even if it is what is popularly called "a one-man company."

Facts of the Case

Salomon for many years carried on business as a leather merchant and wholesale boot manufacturer, and the business had been prosperous. In 1892 he formed a limited company to take over the business, which was duly registered in the name of Salomon and Co. Ltd. The Memorandum of Association was signed by S., his wife, a daughter, and four sons, thus making seven members, and each of such seven persons subscribed the memorandum for one share. The capital of the company was £40,000, divided into 40,000 shares of £1 each. The company duly took over the business of S. at the agreed total purchase-price of £38,782 19s. 7d., it being a term of the agreement that part of the purchase-price should be paid by the issue of debentures by the company to S. All the other six members of the company were fully aware of these terms and were willing to accept them. At the time of the transfer of the business to the company the business was quite solvent.

In pursuance of the said agreement as to the mode of payment of the purchase-price, debentures for £10,000 were issued by the company to S. in part payment thereof. Later, at the request of S., these debentures were cancelled and fresh debentures to the same amount were issued to Broderip as security for £5,000 lent by B. to S., and S. then lent this sum of £5,000 to the company. Shortly after the registration of the company, 20,000 shares of £1 each were issued by the company to S. For these he paid £1 per share out of the balance of the purchase-money received by him for the business. From that date until an order was made for the compulsory liquidation of the company, in 1893, the share register

of the company remained unaltered, 20,001 shares being held by S. and 6 shares by his wife and family.

The company fell upon evil times and made default in paying interest on the debentures, and in 1893 B. instituted an action to enforce his security against the assets of the company. Thereafter, at the instance of unsecured creditors of the company, a liquidation order was made, and a liquidator appointed. The debts of the unsecured creditors of the company amounted to £7,733 8s. 3d. The assets of the company amounted to £6,000 or thereabouts, and after allowing for B.'s debt and interest under the debentures, it would leave a balance of £1,055, which S. claimed as beneficial owner of the debentures for £10,000. In B.'s action to enforce his security, the liquidator made a counterclaim against B. and S., and contended that the company was the mere nominee and agent of S., that S. was liable to indemnify the liquidator against the whole of the unsecured debts of the company, and that he was entitled to a lien for that sum on all moneys payable by the company to S. At the trial the liquidator admitted B.'s claim, but proceeded with the counterclaim.

Decision

On appeal to the **House of Lords**, it was held that the company was a distinct person from Salomon and not his agent, that the debentures were perfectly valid, and that the liquidator's counter-claim failed.

In the course of his speech in the **House of Lords**, Lord MACNAGHTEN said :—

"The company attains maturity on its birth. There is no period of minority—no interval of incapacity. I cannot understand how a body corporate thus made 'capable' by statute can lose its individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment. If the view of the learned Judge (that is, the Judge who tried the case first) were sound, it would follow that no common law partnership could register as a company limited by shares without remaining subject to unlimited liability."

And in a later part of his speech he said :—

“ It has become the fashion to call companies of this class ‘ one-man companies.’ That is a taking nickname, but it does not help one much in the way of argument. . . . If the shares are fully paid up, it cannot matter whether they are in the hands of one or many. If the shares are not fully paid it is as easy to gauge the solvency of an individual as to estimate the financial ability of a crowd.”

NOTES

The limited trading company is a device for enabling a large number of persons to associate together for the purpose of carrying on some kind of business. The law recognises many kinds of associations formed for business purposes of one kind or another, such as partnerships, building societies, friendly societies and trade unions. Companies formed under the Companies Acts 1929 and 1947 are legally called corporations. The essential point to notice about a corporation, as *Salomon v. Salomon* shows, is that it is a separate legal entity entirely distinct from the individual members or corporators, so that the property of a company is owned by the company and not by the members. See further on the point *Macaura v. Northern Assurance Co.*, [1925] A. C. 619, dealt with in detail at p. 245.

This fact constitutes one of the essential differences between a limited company and a partnership, the other leading type of association for business purposes. Again, while each partner is liable for his firm's debts to the extent of his private fortune, the member of a limited company is liable only to the extent of his holding of stock or shares in the company. When the stock or shares have been fully paid up the holder incurs no further pecuniary liability. When they are not paid up he is liable for calls, but this he can escape by transferring them to a third party before a winding-up order has been made against the company. This right of alienation is, however, subject to any restrictions in the Articles of Association. Besides, if the shareholder acts fraudulently he will not escape liability. The principles were laid down in *Re Discoveries Finance Corporation, Ltd., Lindlar's Case*, [1910] 1 Ch. 312. There Lindlar had heard certain rumours about the company of which he held shares which were only partly paid up. He sold them to a man abroad, and the purchase price was never paid, the sale being effected solely to escape liability. It was held that the sale was good, and that the liquidator in the subsequent winding-up of the company had no further claims against him.

According to BUCKLEY, L.J., three cases must be distinguished. In the first the Articles of Association contain no restrictions regarding the transfer of shares, and, provided it is an out and out transfer, the directors are bound to register it though it is made for the express purpose of relieving the transferor from liability. A second set of

articles empowers the directors to reject transfers of shares to persons of whom they do not approve. Here the transferor cannot escape liability if by fraud or concealment he induces the directors to register even an out and out transfer which in the absence of the deceit they would not have passed. Finally, and this may happen in either of the two cases, the transferor has either himself fraudulently or in breach of his duty to the company postponed the beginning of winding-up proceedings, or has induced the directors to do so, in order to get a transfer through before that date. In that case too he cannot rid himself of his liability. In *Salomon's* case the liquidator contended that the third set of facts existed, but he failed to prove his contention. See *infra*, p. 31.

ULTRA VIRES

(1) **ASHBURY RAIL, CARRIAGE AND IRON CO., LTD.**
v. RICHE

(1875), L. R. 7 H. L. 653.

(2) **COTMAN v. BROUGHAM,**
[1918] A. C. 514

Where a contract made by a company, or by the directors on its behalf, is beyond the powers of the company, it is void, and cannot be ratified by the shareholders.

Facts of the First Case

A company was registered under the Companies Act, 1862, and by the third clause of the Memorandum of Association the objects of the company were defined as follows :—"The objects for which the company is established are to make and sell, or lend on hire, railway carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling-stock; to carry on the business of mechanical engineers and general contractors; to purchase and sell, as merchants, timber, coal, metals, or other materials; and to buy and sell any such materials on commission, or as agents." The directors agreed to purchase a concession for making a railway in Belgium, and to form a company in Belgium (called Société Anonyme) to work the concession, and it was further agreed that Messrs. Riche should have the contract for the construction of the railway. Messrs. R. commenced the work, and for some time the Ashbury Company paid money to the Société Anonyme to be paid by them to the contractors, Messrs. R. Later, difficulties arose,

and the shareholders of the Ashbury Company disapproved of what had been done in the matter of the railway, and required the directors to take over the company's interest therein, and to indemnify the shareholders. The directors, however, on behalf of the company, repudiated the contract for the construction of the railway, as being *ultra vires* the company, and Messrs. R. now sued the company for damages for breach of contract.

Decision in the First Case

On appeal to the **House of Lords**, it was held that the contract was *ultra vires* (beyond the powers of) the company, and that accordingly the company was not liable to Messrs. Riche.

In the course of his judgment in the **House of Lords**, Lord CAIRNS, L.C., said, at p. 667 :—

“ Your Lordships are well aware that this is the Act ” (that is, the Companies Act, 1862) “ which put upon its present permanent footing the regulation of joint stock companies which were to be authorised to trade with a limit to their liability. . . . And I will ask your Lordships to observe . . . the marked and entire difference there is between the two documents which form the title deeds of companies of this description—I mean the Memorandum of Association on the one hand, and the Articles of Association on the other hand. With regard to the Memorandum of Association, your Lordships will find . . . that that is, as it were, the charter, and defines the limitation of the powers of a company to be established under the Act. With regard to the Articles of Association, those Articles play a part subsidiary to the Memorandum of Association.”

And later, Lord CAIRNS said, at p. 672 :—

“ Now I am clearly of opinion that this contract was entirely, as I have said, beyond the objects in the Memorandum of Association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, my Lords, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room and every shareholder of the company had said : ' That is a contract which we desire to make, which we authorise the directors to make, to which we sanction the placing of the seal of the company,' the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by Act of Parliament, they were prohibited from doing.”

Facts of the Second Case

The memorandum of an oil company mentioned a vast variety of objects, and among them the underwriting of shares in another company. The objects clause was wound up by words which Lord FINLAY in his speech in the **House of Lords** later declared "extraordinary." By the closing words all the various objects mentioned were declared principal ones and in no way subsidiary to the first mentioned object. The company underwrote shares in a rubber company, and the validity of that act was disputed.

Decision in the Second Case

The **House of Lords** held that the underwriting agreement was not *ultra vires* the company.

Lord PARKER said, at p. 520 :—

" My Lords, Mr. Whinney in his able argument suggested that, in considering whether a particular transaction was or was not *ultra vires* a company, regard ought to be had to the question whether at the date of the transaction the company could have been wound up on the ground that its substratum had failed. Upon consideration I cannot accept this suggestion. The question whether or not a company can be wound up for failure of substratum is a question of equity between a company and its shareholders. The question whether or not a transaction is *ultra vires* is a question of law between the company and a third party. The truth is that the statement of a company's objects in its memorandum is intended to serve a double purpose. In the first place it gives protection to subscribers, who learn from it the purposes to which their money can be applied. In the second place it gives protection to persons who deal with the company, and who can infer from it the extent of the company's powers. The narrower the objects expressed in the memorandum the less is the subscribers' risk, but the wider such objects the greater is the security of those who transact business with the company. Moreover, experience soon shows that persons who transact business with companies do not like having to depend on inference when the validity of a proposed transaction is in question. Even a power to borrow money could not always be safely inferred, much less such a power of underwriting shares in another company. Thus arose the practice of specifying powers as objects, a practice rendered possible by the fact that there is no statutory limit on the number of objects which may be specified. But even thus, a person proposing to deal with a company could not be absolutely safe, for powers specified as objects might be read as ancillary to and exercisable only for the purpose of attaining what might be held to be the company's main or paramount object, and on this construction no one could be quite

certain whether the Court would not hold any proposed transaction to be *ultra vires*. At any rate, all the surrounding circumstances would (521) require investigation. Fresh clauses were framed to meet this difficulty, and the result is the modern memorandum of association with its multifarious list of objects and powers specified as objects and its clauses designed to prevent any specified object being read as ancillary to some other object.

... A person who deals with a company can do everything which it is expressly authorised to do by its memorandum of association, and need not investigate the equities between the company and its shareholders."

NOTES

By the Companies Act, 1929, section 5 (repeating and extending previous statutory enactments), a company is now empowered, by special resolution, to alter the provisions of its Memorandum of Association, with respect to the objects of the company, for any of the seven purposes enumerated in the section: see Stevens' Elements of Mercantile Law, 10th Edn., p. 223.

Under the Act of 1929 such a resolution must be confirmed by the Court, but this will no longer be required in all cases when the Companies Act 1947 comes into force. S. 76 of the latter provides in effect that, normally, a resolution passed in accordance with s. 5. of the 1929 statute is valid by itself and becomes operative after three weeks from its passing. Within this period, however, the holders of 15 per cent of the share capital or any class of the share capital, e.g. preference shareholders, may challenge the alteration by applying to the Court. If they do so the alteration takes effect only on confirmation. This simplification of procedure is coupled with a new flexibility. The Court need no longer either allow or disallow the resolution. It has power to sanction one part of it and reject another, and it may also make an order facilitating the purchase by the majority of the shares held by dissentients. This is one way of protecting minority shareholders, who also in other respects are given new rights against oppression by the management under ss. 9 to 11 of the 1947 Act. On the one hand, the law now provides that such a minority must not obstruct a reasonable development of their company to which the majority has agreed. Yet once the minority has referred the dispute to the Court and the latter has decided against it, minority shareholders are not bound to submit, but may dispose of their shares on terms which the Court recognises as fair.

Although this new legislation has made the alteration of a company's memorandum easier the *ultra vires* doctrine laid down by the House of Lords in the above cases remains valid. If the company purports to make a contract that conflicts with the objects clause in the memorandum the contract is void, and any shareholder may apply to the Court for an injunction to restrain the directors carrying it into effect.

Where directors make a contract within the powers in the company's Memorandum but beyond the powers granted to the management in the Articles of Association the shareholders may ratify it in the same way as any principal may ratify a contract made on his behalf by an agent without authority. Moreover, Articles of Association can be altered by special resolution without the Court being involved.

Further, it should be noted that the objects or powers enumerated in the Memorandum of Association are not to be construed too strictly, and a company can do anything, or make any contract, which is fairly incidental to, or by reasonable implication included in, the objects or powers set out in the Memorandum. (See *Foster v. London, Chatham and Dover Rail. Co.*, [1895] 1 Q. B. 711; and *Deuchar v. Gas, Light and Coke Co.*, [1925] A. C. 691.)

On the other hand, in the case of the *London County Council v. Attorney-General*, [1902] A. C. 165, where the County Council, also a statutory body, had power to purchase and work tramways, it was held that they had no power to run omnibuses in connection with their tramways, the omnibus business not being incidental to the tramway business.

Ultra vires is in theory one of the fundamental principles of company law. As Lord PARKER points out in the judgment quoted above, the result of the *Ashbury Carriage Co. Case* was to make it customary to draft the memorandum of association in such a way as to cover an extraordinarily wide variety of business, as is indicated in the second case. In this way instances of *ultra vires* have in practice become somewhat rare.

The implications of the principle have however carried the Courts into other fields than those simply concerned with the kind of business done by the company, as is shown in some of the cases given later (see pp. 161 *et seq.*).

PRELIMINARY CONTRACTS

KELNER v. BAXTER

(1866), L. R. 2 C. P. 174

A Company cannot contract before it comes into existence, nor ratify a contract made before that time.

The facts and decision in this case are fully set out on page 112, and reference should be made to that page.

THE PROSPECTUS**NASH v. LYNDE,**

[1929] A. C. 158

What is a prospectus and when is it "issued" under the Companies Act?

Facts of the Case

Nash, the managing director of a company, prepared two documents with details of a scheme to increase the capital of the company. To both documents application forms for shares were attached. The first was signed by all directors, the second by Nash alone and marked "strictly private and confidential"; it did not mention that part of the capital had been issued as fully paid otherwise than in cash. Nash sent several copies of both documents to E., a co-director, who passed one copy each to a solicitor, intimating that clients of the latter might be willing to buy shares or like to start a son in a prosperous business. Through the intervention of his brother-in-law, Lynde, who was looking for a company in which to invest some money and to take up employment, was sent the documents by the solicitor, who offered to introduce Lynde to Nash. Lynde and Nash met twice and went through the documents together, but without additional relevant information being disclosed, and Lynde took up 3,000 shares and became a director at a salary of £400 per annum.

When, later, Lynde discovered that a considerable part of the capital had been issued as fully paid otherwise than in cash, he sued Nash for damages on the ground that the latter, by not disclosing this fact, had failed to comply with s. 81, s.s. 1(e) of the Companies (Consolidation) Act, 1908, which imposed this duty in respect of prospectuses "issued by or on behalf of a company or by or on behalf of any person who is or has been engaged or interested in the formation of the company." Under section 285 "Prospectus means any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of a company."

The question raised was whether the documents in this case constituted a "prospectus" or not, and whether they had been "issued" within the meaning of section 81. At the trial the jury

found that the documents were an offer of shares by the company to the public, but that there was no proof that they were in fact issued to the public.

Decision

On appeal to the **House of Lords**, it was held that the documents were not issued as a prospectus within the meaning of section 81 and that Lynde's claim against Nash failed.

In the **House of Lords**, Lord HAILSHAM, L.C., said :—

“ It was said that although the documents might constitute a prospectus within the definition section of the Act, section 81 only applied to a prospectus issued to the public and that there was no evidence that these documents ever were issued to the public. I should be loth to hold that in order to bring section 81 of the Act of Parliament into operation it must be proved that the prospectus in question had been published to any defined number of persons, or that a plaintiff who had been misled by a prospectus which did not comply with statutory requirements must fail in his action unless he could prove that it had been published to persons other than himself. In my judgment it is sufficient in order to bring section 81 into operation that the prospectus in question should be proved to have been shown to any person as a member of the public, and as an invitation to that person to take some of the shares referred to in the prospectus on the terms therein set out. But in my opinion there is a narrower ground upon which the respondent (that is Lynde) “ must fail in the present case. If the documents and letters be looked at as a whole, I think it is clear that these documents were never issued to the respondent as an invitation to him to subscribe to the shares referred to in the prospectus on the terms subscribed, or at all. They were sent to him in order to give him a general idea of the position of the company in case he might think it afforded a suitable opening in which he could find employment upon the terms of investing a small amount of his capital.”

NOTES

The Companies (Consolidation) Act, 1908, is now repealed and replaced by the Companies Act, 1929, but in the latter Act a “ prospectus ” is defined in the same terms as in the Act of 1908; see the 1929 Act, section 380, which has not been affected by the amendments of 1947. But these do contain some important provisions which are designed to make the information contained in prospectuses more informative and accurate than hitherto; see s. 63 *et seq.*, Companies Act, 1947.

THE LIABILITY OF A PROMOTER OF A COMPANY**ERLANGER *v.* NEW SOMBRERO PHOSPHATE CO.**

(1878), 3 App. Cas. 1218

Facts of the Case

The island of Sombrero in the West Indies was Crown property and leased to a company which, during the currency of the lease, was ordered to be wound-up. In the course of the winding-up the lease had to be sold by the liquidator. The appellants formed a syndicate, in effect a partnership, for the purpose of purchasing the lease. The sale was concluded for £55,000 in August, 1871. The head of the syndicate was the banking house of Erlanger, which took the necessary steps for forming a company to take over the lease and to work the phosphate mines. The members of the syndicate were made the first directors of the company, and one of them, J. M. Evans, acted as the vendor of the lease to the new company. The company purchased the lease for £110,000 in September, 1871, and a few days later the contract was approved at the first meeting of the directors. A prospectus was then issued to the public giving a very favourable view of the scheme. A few months later some of the shareholders got to know about the profits made by the syndicate, and as the result of their investigations the company sued the members of the syndicate, praying that the contract be set aside.

Decision

The **House of Lords** ordered the contract to be rescinded, and the syndicate to repay the purchase price to the company, which in turn was to hand back the island to the syndicate.

Lord CAIRNS, L.C., said, at p. 1236:—

"In the whole of this proceeding up to this time the syndicate, or the house of Erlanger as representing the syndicate, were the promoters of the Company, and it is now necessary that I should state to your Lordships in what position I understand the promoters to be placed with reference to the company which they proposed to form. They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into

existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property of themselves, the promoters, it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company, and then sell his property to it, but I do say that if he does he is bound to take care that he sells it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person."

NOTES

It is useful to bear in mind the words of Lord MACNAGHTEN, in *Gluckstein v. Barnes*, [1900] A. C., 240, 248; see *infra*, p. 169:—

"It is the old story. It has been done over and over again. These gentlemen set about forming a company to pay them a handsome sum for taking off their hands a property which they had contracted to buy with that end in view. They bring the company into existence by means of the usual machinery. They appoint themselves sole guardians and protectors of this creature of theirs, half-fledged and just struggling into life, bound hand and foot while yet unborn by contracts tending to their private advantage, and so fashioned by its makers that it could only act by their hands and only see through their eyes. They issue a prospectus representing that they had agreed to purchase the property for a sum largely in excess of the amount which they had, in fact, to pay. On the faith of this prospectus they collect subscriptions from a confiding and credulous public. And then comes the last act. Secretly, and therefore dishonestly, they put into their own pockets the difference between the real and the pretended price. After a brief career the company is ordered to be wound up. In the course of the liquidation the trick is discovered."

In the case in which these words were spoken Gluckstein and three others were trustees of a fund raised by a syndicate that had been formed to buy and re-sell Olympia. The trustees, on behalf of the syndicate, bought up at reduced prices some of the debenture bonds and a mortgage on Olympia. Later, they bought the property itself for £140,000. Having done this the trustees formed a company, of which they themselves became directors, and sold Olympia to the

company for £180,000. Thereupon, the new directors issued a prospectus inviting applications for shares in the company. In it they disclosed the profit of £40,000 made on the re-sale of Olympia. But they did not disclose a further profit of £20,000 made after debenture bonds and mortgage, which they had bought up cheap, had been paid off. It was held that this second profit should also have been disclosed, and they must account to the company for their share in it—£6,341.

Promoters and other persons who have authorised the issue of a prospectus are liable for untrue statements contained in it in accordance with s. 37, Companies Act, 1929, and s. 65 (3), Companies Act, 1947. Under s. 66 of the last mentioned Act such persons will also incur criminal liability unless the untrue statement was immaterial or they had reasonable ground to believe and did in fact believe that the statement in the issued prospectus was true. See *Derry v. Peek* and notes, *supra*, p. 93.

See also *R. v. Kylsant*, [1932] 1 K. B. 442, mentioned *supra*, p. 95, and Stevens' Elements of Mercantile Law, 10th Edn., pp. 117, 227.

ARTICLES OF ASSOCIATION

BROWN *v.* BRITISH ABRASIVE WHEEL CO., LTD., [1919] 1 Ch. 290

A company cannot alter its Articles of Association simply for the benefit of the majority of shareholders—any alteration must be made bona fide for the benefit of the company as a whole.

Facts of the Case

The defendant company was incorporated in 1909, but had not been very successful, and in nine years had only paid four dividends. In 1918 it was practically at the end of its resources. In March, 1918, two shareholders, S. and A., offered to buy up the shares of the existing members at par. This offer was to a large extent accepted, and S. and A. now held 49,119 out of the 50,000 shares issued by the company, and the three directors held 100 shares each. The remaining shares belonged to five holders, including the plaintiff, who held 50.

The position of the company was improving under a reconstituted Board, and S. and A. and also the directors thought it desirable that the owners of the controlling interest in the company should have power to buy up the rest of the shares, with a view to getting in more capital, which would be required. The alternative was to wind up the company. The directors were of opinion

that the proposed power was for the benefit of the company as a whole. An extraordinary meeting of the shareholders was therefore called for the purpose of passing an Article providing that a shareholder should be bound, on the request in writing of the holders of nine-tenths of the issued shares, to sell his shares to the nominee of such holders, in consideration of the payment of the fair value of the shares, to be ascertained in accordance with the Articles, or the par value thereof, whichever should be the greater.

The plaintiff thereupon brought this action to restrain the company and directors from holding meetings to pass, and from passing, the proposed new Article. He did not challenge the *bona fides* of the directors, or of the majority, but contended that it was not in the interests of the company as a whole to pass an Article enabling the majority to expropriate the minority.

Decision

ASTBURY, J., decided that the majority of the shareholders were not entitled to enforce the Article against the minority, and granted an injunction restraining the company and the directors from passing the same, and in the course of his judgment he said :—

“ In *Allen v. Gold Reefs of West Africa, Ltd.*,” [1900] 1 Ch. 656, “ the majority of the Court of Appeal sanctioned, as against the only holder of fully paid shares, a new Article imposing a lien on fully paid shares. LINDLEY, M.R., said: ‘ The power thus conferred on companies to alter the regulations contained in their Articles is limited only by the provisions contained in the statute, and the conditions contained in the company’s Memorandum of Association. Wide, however, as the language of s. 50 (now s. 13) is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also *bona fide* for the benefit of the company as a whole, and it must not be exceeded.’ The question therefore is whether the enforcement of the proposed alteration on the minority is within the ordinary principles of justice, and whether it is for the benefit of the company as a whole. I find it very difficult to follow how it can be just and equitable that a majority, on failing to purchase the shares of a minority by agreement, can take power to do so compulsorily.”

NOTES

In the case of *Sidebottom v. Kershaw, Leese & Co., Ltd.*, [1920] 1 Ch. 154, the majority of the shares of a private company were held by the

directors, and the Articles were altered by adding a new Article empowering the directors to require any shareholder who carried on business in direct competition with the company's business, or who was a director of any company carrying on such business, to transfer his shares, at their full value, to nominees of the directors. It was held that the resolution making this alteration was passed *bona fide* for the benefit of the company as a whole, and was therefore valid.

In the case of *Shuttleworth v. Cox Bros. & Co. (Maidenhead) Ltd.*, [1927] 2 K. B. 9, the Court of Appeal decided that it was for the shareholders, and not the Court, to say whether an alteration of Articles was for the benefit of the company, provided it was not of such a character as that no reasonable men could regard it as being for the benefit of the company ; and the Court further held, in the case of a company whose Articles provided that the first directors should hold office for life, subject to disqualification on any one of six grounds, that an alteration of the Articles adding a seventh ground of disqualification—namely, a request in writing to a director by all his co-directors that he should resign his office—was valid, there being no evidence of bad faith.

The case of *Allen v. Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656, referred to above, should also be noted.

The cases referred to above illustrate one limitation of the shareholders' rights to alter the articles of association. Another limitation is, of course, the memorandum. Since the memorandum governs all affairs of the company it also determines the scope of the articles ; these must contain nothing incompatible with the terms of the memorandum. For instance, in *Andrews v. Gas Meter Co.*, [1897] 1 Ch. 361, the memorandum fixed the nominal capital at £60,000, divided into 600 shares of £100, and gave power to increase the capital according to rules laid down in the articles. When the company required more capital to buy a new business the articles were amended by a resolution creating preference shares which guaranteed to holders a £5 dividend, but withheld the vote from them. Later, when a reserve fund, accumulated earlier, was no longer needed, it was resolved to distribute it among the shareholders, and the question arose whether the preference shareholders were entitled to a share in the fund. This depended on whether the preference shares were validly issued. It was held that they were. The words in the memorandum showed that the conditions on which the new capital was to be issued were to be ascertained from the articles alone. Since articles might be changed from time to time under the Companies Act, the resolution to create preference shares was valid. The decision would have been the other way had, for instance, the memorandum forbidden the issue of preference shares. Another important point with regard to articles of association was brought out by *Eley v. Positive Government Security Life Assurance Co.* (1876), 1 Ex. D. 88. There one clause of the articles stipulated that the plaintiff should be the solicitor to the company and not removable from that post except for misconduct. The articles were signed by seven members of the company and registered. For some time the

plaintiff acted as solicitor, but later the company refused to employ him and instructed other solicitors. The plaintiff sued, but his action was dismissed. Articles were a matter between shareholders *inter se* or between shareholders and directors. They certainly created no contract between the company and the plaintiff.

On the other hand, the exercise of a power contained in articles of association may constitute a breach of contract. In *Southern Foundries, Ltd. v. Shirlaw*, [1940] A. C. 701, the appellants had appointed the respondent managing director for 10 years. Later, the company's articles were altered; it was given the power to remove a director at any time, and it was provided that the managing director must have the qualification for a director. The company exercised its power and removed the respondent from his post, but the House of Lords held that this was a breach of contract. To have altered the articles and created the power was no breach, but to exercise it in this case was. The company had the power but not the right to remove the managing director during the contract period.

MEMORANDUM OF ASSOCIATION

THE ROYAL BRITISH BANK v. TURQUAND (1856), 6 E. & B. 327

A person dealing with a registered company is deemed to have notice of the contents of the Memorandum and Articles of Association and must satisfy himself that the proposed transaction is not inconsistent therewith; but he need not inquire whether all the necessary steps have been taken by the company to make the matter complete and regular.

Facts of the Case

A company was duly registered under the Companies Act, then in force, and one of the clauses of the Deed of Settlement (which at that time fulfilled the same purposes as the present Memorandum and Articles of Association) provided that the directors, in the name of the company, might borrow on mortgage, bond, or bill such sums as should be authorised by a resolution passed at a general meeting of the company, such sums not to exceed a prescribed limit. The company wished to arrange for advances to be made by the plaintiff bank, and a bond for £2,000 was accordingly given to the bank to secure such advances, the bond being sealed

by the company, and signed by two directors. The bank now sued the defendant as the official manager of the company (in accordance with the Joint Stock Companies Winding-up Acts) to recover the amount advanced by them. It was contended by the defendant on behalf of the company that the shareholders had not passed a resolution at a general meeting authorising the borrowing of the money, or the making of the bond, and that the bank could not recover.

Decision

It was held by the **Court of Exchequer Chamber** that as the power to borrow money on bonds was not inconsistent with the provisions of the Deed of Settlement, the bank were entitled to assume that the necessary resolution had been passed by the shareholders, and could recover the amount owing.

In the **Court of Exchequer Chamber**, JERVIS, C.J., said :—

“ We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the Deed of Settlement. But they are not bound to do more. And the party here, on reading the Deed of Settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorising that which on the face of the document appeared to be legitimately done.”

NOTES

The principle of this case can broadly be stated in this way : a person dealing with a limited company may rely on the apparent facts, and is not bound to inquire into the so-called “ indoor management.”

The rule laid down in this case will not apply where the person dealing with a company knows that in the particular transaction the company is acting without authority. And so, in *Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 366, where the power of the directors of a company to borrow money was restricted by the Articles to an amount not exceeding, at any one time, one-half of the paid-up capital, and a bank had lent to the company much more than that amount, and so knew that the amount lent was beyond the borrowing power of the directors, it was held that the bank could only recover a reduced amount, equal to one-half of the paid-up capital of the company.

Neither does the rule apply where the person contracting with the company had not in fact inspected the memorandum and articles, and the unauthorised act done by the officer of the company was not within the usual powers of such an officer. In these circumstances it cannot

be said that the company has held out its officer as its agent. Thus in *Kreditbank Cassel G.m.b.H. v. Schenkers, Ltd.*, [1927] 1 K. B. 826, the company under its articles had power to delegate the drawing of bills of exchange to persons other than directors. A branch manager, to whom the power had *not* been delegated, put his company's name to a bill of exchange, which came into the hands of the plaintiffs. It was held that the company was not liable on the bill. The plaintiffs had not inspected the articles and had therefore not acted in reliance on them. Neither had they relied on any apparent authority apart from the articles, since in the ordinary course of business branch managers have no power to sign bills of exchange for a company.

Nor does the rule apply where the transaction is of an unusual nature, or there is an absence of ostensible authority on the part of the person purporting to act for the company—in such cases the person dealing with the company is put upon inquiry, and is not entitled to assume that everything is regular and in order. (See *Houghton & Co. v. Nothard, Lowe and Wills, Ltd.*, [1927] 1 K. B. 246; [1928] A. C. 1.) See also Stevens' Elements of Mercantile Law, 10th Edn., p. 226.

SHARES

OOREGUM GOLD MINING CO. OF INDIA v. ROPER, [1892] A. C. 125

Shares in a limited company must not be issued at a discount.

Facts of the Case

The company was in want of money and decided to procure this by a fresh issue of shares. As the original shares were at a great discount, it was clear that it would be difficult to issue new shares at par. The directors, therefore, acting *bona fide* for the benefit of the company, decided to issue shares of £1 each with 15s. credited as paid. One of the shareholders brought the present proceedings to test the validity of the transaction.

Decision

On appeal to the **House of Lords** it was held that it was beyond the powers of the company to issue shares at a discount, and so far as the shares were held by the original allottees the latter were liable for the nominal value of the shares.

Lord HALSLEY, L.C., said, at p. 134:—

“ I think that the question which your Lordships have to solve is one which may be answered by reference to an inquiry: What is

the nature of an agreement to take a share in a limited company ? and that that question may be answered by saying, that it is an agreement to become liable to pay to the company the amount for which the share has been created. That agreement is one which the company itself has no authority to alter or qualify, and I am therefore of opinion that, treating the question as unaffected by the Act of 1867, the company were prohibited by law, upon the principle laid down in *Ashbury Railway Carriage and Iron Co. v. Riche* ((1875), L. R. 7 H. L. 653), from doing that which is compendiously described as issuing shares at a discount."

LORD WATSON said, at p. 136 :—

" In my opinion, these enactments read together indicate the intention of the Legislature that every member who takes shares from the company in return for cash shall either pay or become liable to contribute their full nominal value. 'The 'amount, if any, unpaid,' obviously refers to the 'fixed amount' of the shares into which the capital is divided, as set forth in the memorandum, and not to any lesser amount which may be agreed upon between the company and its shareholders ; and the statutory liability of each shareholder is for the difference between the amount fixed by the memorandum and the sum which has actually been paid upon his shares. Consequently, if shares are issued against money, it appears to me that any payment to the company less than the nominal amount of the share must, by force of the statute, and notwithstanding any agreement to the contrary, be treated as a payment to account, the member remaining liable to contribute the balance, when duly called for.

" A company is free to contract with an applicant for its shares ; and when he pays in cash the nominal amount of the shares allotted to him, the company may at once return the money in satisfaction of its legal indebtedness for goods supplied or services rendered by him. That circuitous process is not essential. It has been decided that, under the Act of 1862, shares may be lawfully issued as fully paid up, for considerations which the company has agreed to accept as representing in money's worth the nominal value of the shares. I do not think any other decision could have been given in the case of a genuine transaction of that nature where the consideration was the substantial equivalent of full payment of the shares in cash. The possible objection to such an arrangement is that the company may over-estimate the value of the consideration, and, therefore, receive less than nominal value for its shares. The (p. 137) Court would doubtless refuse effect to a colourable transaction, entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount, but it has been ruled that, so long as the company honestly regards the consideration given as fairly representing the nominal value of the shares in cash, its estimate ought not to be critically examined. That state of the

law is certainly calculated to induce companies who are in want of money, and whose shares are unsaleable except at a discount, to pay extravagant prices for goods or work to persons who are willing to take payment in shares. The rule is capable of being abused, and I have little doubt that it has been liberally construed in practice."

NOTES

Conservation of capital is one of the main principles of Company Law. From it follows the rule that shares must not be issued at a discount. This is intended to ensure that the whole nominal capital is received by the company so that persons dealing with it may be certain of initial assets. Nevertheless it has been realised that there are occasions on which the issue of shares below the nominal value is legitimate. Section 47 of the Companies Act, 1929, makes provision for such cases: see Stevens' Elements of Mercantile Law, 10th Edn., p. 237.

It will be observed that Lord WATSON draws attention to the fact that companies are allowed to issue shares for a consideration other than cash, and that this opens the way to abuses, and may result in the company issuing shares at a discount. As to this see *In re Wragg, infra.*

Re WRAGG, LTD., [1897] 1 Ch. 796

Subject to compliance with the requirements of the Companies Act, a company can buy property at any price it thinks fit, and pay for it by the issue of shares as fully-paid otherwise than in cash.

Facts of the Case

For many years Wragg and Martin carried on business together as omnibus and coach proprietors, livery-stable keepers, and job-masters in Whitechapel and elsewhere, and they were the owners of freehold and leasehold property, and a considerable number of horses and carriages, and a quantity of harness, stock-in-trade, plant and effects. In 1894, they formed a private limited company to take over the business, and the property and assets, at a price which they fixed at £46,300, to be payable in cash, debentures, and fully-paid shares. W. and M. and another were appointed the first directors. In accordance with one of the Articles of Association, the company, when incorporated, entered into an agreement with W. and M. to purchase the business and property and assets on these terms, and it was agreed that £20,000, part of the purchase-

price, should be paid by the allotment to W. and M. of fully-paid shares of the company. The agreement was registered as required by statute and the shares were duly issued as fully-paid. In 1896 the company went into liquidation. The liquidator now contended that the shares so issued to W. and M. as fully-paid were improperly issued and could not properly be treated as fully-paid, and that W. and M. should be ordered to pay the nominal amount of such shares in cash.

Decision

It was held by the **Court of Appeal** that W. and M. were not liable to pay for the shares in cash, and that the liquidator's claim failed.

In the **Court of Appeal**, LINDLEY, L.J., said :—

“ It has however never yet been decided that a limited company cannot buy property or pay for services at any price it thinks proper, and pay for them in fully paid-up shares. Provided a limited company does so honestly and not colourably, and provided that it has not been so imposed upon as to be entitled to be relieved from its bargain, it appears to be settled by *Pell's Case* (1869), L. R. 8 Eq. 222, and the others to which I have referred, of which *Anderson's Case* (1876), 7 Ch. D. 75, is the most striking, that agreements by limited companies to pay for property or services in paid-up shares are valid and binding on the companies and their creditors. The legislature appears to me to have distinctly recognised such to be the law, but to have required in order to make such agreements binding that they shall be registered before the shares are issued.”

And A. L. SMITH, L.J., said :—

“ If however the consideration which the company has agreed to accept as representing in money's worth the nominal value of the shares, be a consideration not clearly colourable nor illusory, then, in my judgment, the adequacy of the consideration cannot be impeached by a liquidator unless the contract can also be impeached; and I take it to be the law that it is not open to a liquidator, unless he is able to impeach the agreement, to go into the adequacy of the consideration to shew that the company have agreed to give an excessive value for what they have purchased.”

NOTES

The obligation to register a written contract, or particulars of the contract if not in writing, under which shares are issued as fully or partly paid-up otherwise than in cash, is now contained in section 42 of the Companies Act, 1929.

TREVOR v. WHITWORTH

(1887), 12 App. Cas. 409

*A company is not allowed to buy its own shares.***Facts of the Case**

James Schofield & Sons, Ltd., were a limited company, incorporated under the Companies Act, 1862, with the object of carrying on the business of flannel manufacturers. By its articles of association the company was authorised to buy its own shares. When one of the shareholders died the directors were anxious to prevent those shares from passing into the hands of an outsider, and so they bought them from the deceased's executors. By the contract between the executors and the company the price was to be paid by instalments, but a winding-up order was made before the last instalment was paid, and the executors sued the liquidator for the unpaid balance of the purchase price.

Decision

The **House of Lords** dismissed the action. Notwithstanding the authority given in the articles of association the company was not entitled to buy its own shares ; the purchase of them was *ultra vires*. Since the paid-up capital of a limited company represents the fund out of which the company's liabilities are intended to be met, the moneys in that fund may be spent only for legitimate objects of the company. The purchase of its own shares is not a legitimate object, because the capital of the company is thereby reduced without the safeguards set up by the Act.

NOTES

This case was the authority on which *Ooregum Gold Mining Co. v. Roper*, [1892] A. C. 125, was decided (see *supra*, p. 161). The Companies Act, 1929, has by section 45 also prohibited companies from giving financial assistance to persons desirous of buying its shares, since to do so might be an evasion of the rule in *Trevor v. Whitworth*, and this prohibition has been extended to the subscription for shares and purchase of, and subscription for shares, in a company's holding company ; see s. 73, Companies Act, 1947. See *infra*, p. 166. However, section 45 authorises three exceptions to this rule :—

(a) a company whose ordinary course of business it is to lend money is, if acting in the ordinary course of business, permitted to lend money to a customer who wishes to buy its shares. This covers loans made by banking institutions to a customer about to buy shares of the bank ;

(b) if a scheme is in force by which a trustee buys shares for the benefit of the company's employees, the company may give financial assistance to the trustee; likewise

(c) if employees, other than directors, wish to buy shares in the company by which they are employed the company may lend them the funds necessary for such purchase. Loans made under (b) and (c) must be shown as a separate item in every balance sheet.

DIVIDENDS

Re EXCHANGE BANKING CO.: FLITCROFT'S CASE

(1882), 21 Ch. D. 519

Dividends must not be paid out of capital.

Facts of the Case

The directors of a limited company presented to the general meeting reports and balance sheets in which various debts known to the directors to be bad were entered as assets. Thereby an apparent profit was shown, and a dividend declared and paid. Subsequently the company was wound up and the liquidator applied for an order making the directors liable to replace the money paid by way of dividend, and in fact paid out of capital.

Decision

The order asked for was made.

In the **Court of Appeal** JESSEL, M.R., said, at p. 533 :—

"A limited company by its memorandum of association declares that its capital is to be applied for the purposes of the business. It cannot reduce its capital except in the manner and with the safeguards provided by statute, and looking at the Act 40 and 41 Vict. c. 26, it clearly is against the intention of the Legislature that any portion of the capital should be returned to the shareholders without the statutory conditions being complied with. A limited company cannot in any other way make a return of capital, the sanction of a general meeting can give no validity to such a proceeding, and even the sanction of every shareholder cannot bring within the powers of the company an act which is not within its powers. If, therefore, the shareholders had all been present at the meetings, and had all known the facts and had all concurred in declaring the dividends, the payment of the dividends would not be effectually sanctioned. One reason is

this—there is a statement that the capital shall be applied for the purposes of the business, and on the faith of that statement, which is sometimes said to be an implied contract with creditors, people dealing with the company give it credit. The creditor has no debtor but that impalpable thing the corporation, which has no property except the assets of the business. The creditor, therefore, I may say, gives credit to that capital, gives credit to the company on the faith of the representation that the capital shall be applied only (p. 534) for the purposes of the business, and he has therefore a right to say that the corporation shall keep its capital and not return it to the shareholders, though it may be a right which he cannot enforce otherwise than by a winding-up order. It follows then that if directors who are quasi trustees for the company improperly pay away the assets to the shareholders, they are liable to replace them."

NOTES

This is a further illustration of the principle of conservation of capital.

See also *Re Sharpe, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154. In that case directors of a company which had made no profits paid interest on the amount paid up on the shares. The Court of Appeal held that such interest payments were *ultra vires*, and ordered the personal representatives of a deceased director to replace the sums so paid away. This case should be distinguished from that where shareholders pay money in advance of calls. If such payment is in the interest of the company and the regulations give authority to do so, the directors may pay interest on such amounts. See *Sykes' Case* (1872), L. R. 13 Eq. 255. Moreover, in certain circumstances the Board of Trade may allow payment of interest on shares under section 54, Companies Act, 1929.

The rule that dividends *must* not be paid out of capital is supplemented by the second one that dividends *should* only be paid out of profits. In other words, so long as the capital remains intact dividends may be paid though no profits have been made, for instance from a dividend reserve fund.

These rules have made it necessary to develop further rules in order to determine the circumstances in which a company can be said to have made a profit in spite of the depreciation of some of its assets. For this purpose assets are divided into two classes, so-called "fixed capital" and "circulating capital." These terms are somewhat misleading, for the "capital" of the company is only its share capital, but if it is borne in mind that "fixed and circulating capital" means "fixed" and "circulating" assets no harm is done. The point to remember is that losses suffered during the financial year in respect of "fixed capital" need generally not be taken into account when

determining the profits. See *Lee v. Neuchatel Asphalte Co.* (1887), 41 Ch. D. 1; *Verner v. General and Commercial Investment Trust*, [1894] 2 Ch. 239. See also Stevens' Elements of Mercantile Law, 10th Edn., p. 238.

ALEXANDER v. AUTOMATIC TELEPHONE CO.,
[1900] 2 Ch. 56

Directors of a company are in the position of trustees for the company.

Facts of the Case

A company was incorporated with a capital of £100,000 in shares of 5s. each. There were eight signatories to the memorandum, including Margowski for 19,400 shares; M. again as managing director of the H. Co. for 6,000 shares; Cohen for 10 shares; Sworn for 800; and the two plaintiffs for 10 shares each. Clause 5 of the Articles provided that the shares of the company should be under the control of the directors and that on the issue of shares they might make arrangements for a difference between the holders as to the amount, and the time of payment, of calls.

At a board meeting a resolution was passed accepting applications for 9,560 shares, subject to payment of 2s. 6d. per share on allotment. The applicants had already paid 6d. per share on application. Another resolution was also passed accepting applications from the subscribers to the memorandum for their shares, nothing being stated as to the amount payable on allotment.

The plaintiffs had paid 3s. per share in respect of their own shares, but alleged that in respect of the shares held by M., C., S. and the H. Co., only £784 had been paid, and that the sum of £3,176 was still due to make up the sum of 3s. per share, the same amount as paid by the holders of other shares, and they brought this action claiming (*inter alia*) that the holders of the memorandum shares were bound to pay up 3s. per share, like the other members.

M., C., and S. alleged that before the company was incorporated it was agreed that nothing should be paid by them on application or allotment in respect of their memorandum shares and that they signed the memorandum on this condition.

M., C., and S. were directors of the company. So also were the plaintiffs.

Decision

It was held, by the **Court of Appeal**, that Margowski, Cohen and Sworn were guilty of a breach of their duty as directors of the company in not paying to the company, in respect of their shares, the sum of 3s. per share, the amount which they obtained from the other members in respect of their shares, and that the plaintiffs might apply for an order for payment of such sum if necessary.

LINDLEY, M.R., in his judgment, said, at p. 66:—

“The Court of Chancery has always exacted from directors the observance of good faith towards their shareholders and towards those who take shares from the company and become co-adventurers with themselves and others who may join them. The maxim *caveat emptor* has no application to such cases, and directors who so use their powers as to obtain benefits for themselves at the expense of the shareholders, without informing them of the fact, cannot retain those benefits and must account for them to the company, so that all the shareholders may participate in them.”

NOTES

An even stronger case was that of *Re London and South Western Canal, Ltd.*, [1911] 1 Ch. 346, where directors held their qualification shares in trust for the promoter. The latter sold to the company property for £88,000, although he had bought it three months earlier for £500, and the directors approved this bargain, which was very unfavourable for the company. SWINFEN EADY, J., said (at p. 350):—

“There was a clear misfeasance by each of these directors. . . . It is misfeasance to qualify by taking shares in trust for the promoter and to execute blank transfers for the promoter to fill up at his pleasure. Directors so qualified hold office at the will of the promoter, and as long as they fulfil his wishes. But as soon as they act contrary to the promoter’s wishes he can fill up and lodge the transfers and disqualify them.”

When the company went into liquidation the directors were accordingly ordered to pay the same amount which ordinary subscribers of shares had paid. In view of the misfeasance the defence that they derived no benefit from the shares and should therefore be excused liability on them was rejected. *Re George Newman & Co.*, [1895] 1 Ch. 674, was a case where the director made himself a present out of the company’s assets, although the articles did not sanction such procedure and the shareholders had not agreed. See also *Gluckstein v. Barnes*, [1900] A. C. 240, *supra*, p. 155.

SALE OF GOODS

LEE v. GRIFFIN

(1861), 1 B. & S. 272

Distinction between a sale of goods and a contract for work and labour.

Facts of the Case

Frances P. ordered the plaintiff to make her a set of artificial teeth and fit it to her mouth. When the set was ready the plaintiff informed P. and requested her to make an appointment for the fitting, but before such appointment could be made P. died, and the plaintiff sued the executors for compensation for work and labour done and materials provided for P.

Decision

It was held by the **Exchequer Chamber** that this was not a contract for work and labour, but a contract for the sale of goods, and that in the absence of a note or memorandum in writing under s. 17, of the Statute of Frauds, 1677 (now s. 4, of the Sale of Goods Act, 1893) the claim was not enforceable by an action in a Court of law.

BLACKBURN, J., said, at p. 277 :—

" The question is whether the contract was one for the sale of goods or for work and labour. I think that in all cases, in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labour done and materials provided, we must look at the particular contract entered into between the parties. If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labour; but, if the result of the contract is that the party has done work and labour which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed is an illustration of this latter proposition. It cannot be said that the paper and ink he uses in the preparation of the deed are goods sold and delivered. The case of a printer printing a book would most probably fall within the same category. . . . I do not think that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill and labour, supposing it to be

of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel."

NOTES

In the normal contract for work and materials, such as that entered into by a householder with a decorator, no difficulty arises, but where the contract results in the production of a chattel, the problem whether it was a contract of sale or for work and materials may be very difficult. It can however only arise where the workman provides the substantial part of the materials, for if the other party provides them it is a contract for work only. Where the workman supplies the materials, and works them up into a chattel the property in which is to pass to the other party the decision in *Lee v. Griffin* shows that it is *prima facie* a case of sale. But this is not so in all cases.

As an example of a contract which appears to satisfy the test in *Lee v. Griffin* but was held not to be a contract of sale we may take *Robinson v. Graves*, [1935] 1 K. B. 579, where the defendant by word of mouth commissioned the plaintiff to paint a portrait for 250 guineas, and before it was completed repudiated the contract. When the plaintiff sued for the price the Court held that the contract was one for work and labour and not for the sale of goods, so that an action could be brought though the contract was not evidenced by a note or memorandum in writing. The learned judges came to the conclusion that the skill and labour to be exercised were the main substance of the agreement, and that the sale of paint and canvas was only ancillary to the main purpose. They even purported to adopt the test laid down by BLACKBURN, J., and did not profess to overrule the decision in *Lee v. Griffin*. It is accordingly very difficult to deduce any clear test from the cases.

The practical importance of the distinction is mainly for the purpose of deciding whether or not s. 4 of the Sale of Goods Act, 1893, applies. As to this see *Morris v. Baron & Co., supra*, p. 5, and Stevens' Elements of Mercantile Law, 10th Edn., pp. 290 *et seq.* Another interesting application arose out of the legislation against profiteering during the Great War, 1914-1918. In *Rex v. Wood Green Profiteering Committee: Ex parte Boots Cash Chemists (Southern), Ltd.* (1919), 36 T. L. R. 47, this came up for decision. By s. 1 of the Profiteering Act, 1919, the Board of Trade was given power to investigate excessive charges in respect of the sale of certain articles. The applicants contended that this Act did not apply to compound medicines, since the price was made up of the value of services rendered in dispensing and the value of the drugs used. But the Court, following *Lee v. Griffin*, held that it was a sale, since the transaction resulted in the sale of a chattel, and it was immaterial to consider the relative values of the services and the materials used in the process.

EVIDENCE OF CONTRACT

ABBOTT & CO. v. WOLSEY,

[1895] 2 Q. B. 97

The meaning of an acceptance under s. 4 of the Sale of Goods Act, 1893.

Facts of the Case

The plaintiffs sold to the defendant 20 tons of Dutch hay, to be delivered at his wharf. There was no memorandum in writing of the contract signed by the defendant or his agent. When the hay was delivered, the plaintiffs' lighterman handed the defendant's servant a receiving note which was not returned. The defendant himself came on board the barge which brought the hay, took a sample of the hay, and, after examining it, said :—

“The hay is not to my sample and I shall not have it.”

The defendant refused to have the hay, and the plaintiffs sued him for damages and contended that he had accepted the hay within the meaning of section 4 of the Sale of Goods Act, 1893.

That section provides that a contract for the sale of goods of the value of £10 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf. And sub-section 3 of the same section defines an acceptance as follows :—

“There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.”

Decision

The Court of Appeal adjudged that there was evidence of an acceptance within the meaning of section 4 (3), and that the plaintiffs were entitled to succeed.

Lord ESHER, M.R., said, at p. 100 :—

“It is clear that the term ‘acceptance’ is used in two senses. . . . When section 4, sub-section 3, is contrasted with section 35 of the Sale of Goods Act, 1893, it is obvious that the Statute

recognises this difference. The acceptance under section 4 is such an acceptance as will show the existence of a contract which the Court may enforce. . . . The acceptance described in section 35 which is to bind the purchaser to pay for the goods is a different thing. The only question here is as to the existence of the kind of acceptance mentioned in section 4. . . . It may be that mere inspection would not amount to an act which recognises a pre-existing contract; but, if the defendant does an act, and uses words with regard to that act, those words are material as explaining the act and showing the nature of it. Here the defendant took what is known in business as a sample. He not only took that sample, but he said that it was not equal to his sample; by which he must have meant some sample previously given to him in connection with a contract for the sale of hay. . . . I think that that act of taking a sample, as explained by the words which accompanied it, was an act which recognised a pre-existing contract."

NOTES

The student should realise that this case is concerned simply with the question of whether there was sufficient evidence of a contract of sale to enable proceedings to be brought. The point as to whether the hay was in fact up to sample is not here in issue. The case of *Prested Miners Co., Ltd. v. Gardner, Ltd.*, [1911] 1 K. B. 425, dealt with on page 10, should be referred to.

CONDITIONS AND WARRANTIES

(1) BEHN v. BURNESS

(1863), 3 B. & S. 751

(2) DE LASSALLE v. GUILDFORD,

[1901] 2 K. B. 215

Whether a stipulation in a contract for the sale of goods is a condition or a warranty depends in each case on the construction of the contract.

The facts and decisions of these cases have been fully set out at p. 64 *supra*, and reference should be made to those pages. As to the law relating to conditions and warranties see also Stevens' Elements of Mercantile Law, 10th Edn., pp. 300 *et seq.*

The distinction between conditions and warranties presents special difficulties in contracts for the sale of goods. To understand this it is well to bear in mind that English law is reluctant to avoid contracts once they have in any way been executed, for when that has happened it is often difficult to put the parties back into the same position in which they were prior to the execution (see also misrepresentation, *supra*, p. 97). Now, in contracts for the sale of goods the mere passing of property from the seller to the buyer is regarded as execution, so that once this has happened a contract is not even discharged by the breach of a condition, but instead the breach of condition is regarded as a breach of warranty, giving the buyer a right to claim damages. Thus where specific goods in a deliverable state are sold, without a special term permitting the buyer examination and, if necessary, rejection, the property passes on sale, and when it later appears that a condition is broken, the buyer nevertheless is bound to perform his obligations under the contract, that is to pay the price, but he is entitled to claim damages from the seller.

On the other hand, if on the sale of specific goods in a deliverable state a special term for examination has been agreed upon, or if the sale is for unascertained goods, then, whether or not the property has passed, a breach of a condition does give the buyer a right to repudiate the whole contract so long as he has not accepted the goods, see *infra*, p. 176, and ss. 11 (1) (c) and 35, Sale of Goods Act, 1893. The reason for this relaxation of the strict rule is probably that the second group of sales include commercial sales, where business necessity calls for a modification.

Conversely, there are occasions where the breach of a condition prevents the passing of property. Under a c.i.f. contract goods are not appropriated "unconditionally" under s. 18 rule 5, Sale of Goods Act, when they are shipped, even if the seller sends notice of appropriation to the buyer. See Lord WRIGHT in *Bailey v. Smyth* (1940), T. L. R. 825; see *infra*, p. 197. Property does not pass until the bill of lading, issued to the order of the shipper, is endorsed and delivered to the purchaser. If on such a sale the goods on arrival are examined and found not to be of the agreed quality the purchaser can repudiate the contract and reject the goods. The breach of the condition of quality has prevented the property from passing. For further discussion see *Hardy v. Hillerns*, p. 201.

PRICE MAINTENANCE**DUNLOP PNEUMATIC TYRE CO., LTD. v. SELFRIDGE & CO., LTD.,**

[1915] A. C. 847

It may be made a term in a contract of sale that the buyer should re-sell the purchased articles only at a price fixed by the original seller.

The facts of and decision in this case have been fully set out *supra*, pp. 45 *et seq.*, and reference should be made to those pages. Here it should be noticed that it is a common practice on the part of manufacturers to attempt to fix standard prices by making it a condition of the contract of sale that the purchaser should only re-sell according to standard lists of prices. Difficulties attending this practice appear from this and other cases referred to in the notes, *supra*, p. 46. An attempt to destroy the whole process on the ground that such a condition is void as in restraint of trade was made in *Palmolive Co. (of England), Ltd. v. Freedman* (1927), 44 T. L. R. 86, but failed. There the defendant was a wholesale and retail dealer who purchased from the plaintiffs 12 gross of Palmolive soap tablets. He signed an agreement binding himself not to re-sell the soap at less than 6d. a tablet. Contrary to this undertaking he sold tablets for 5d. a tablet, and the plaintiffs asked for an injunction restraining the defendant from continuing to do so. The latter pleaded that the term fixing a re-sale price was void as in restraint of trade. But the Court of Appeal rejected this contention and gave judgment for the plaintiffs. The term was reasonable as between the parties and not detrimental to the public. With regard to restraint of trade in general, see cases and notes *supra*, pp. 31 *et seq.*

VARLEY v. WHIPP,

[1900] 1 Q. B. 513

When a person buys goods which he has not seen, and relies solely on the description given by the seller, there is a sale of goods by description within the meaning of the Sale of Goods Act.

Facts of the Case

The plaintiff agreed to sell to the defendant for £21 a second-hand self-binder reaping machine, which had been new the previous year and had only been used to cut 50 or 60 acres. The defendant had not seen the machine. The plaintiff sent it by rail to the defendant.

On its arrival, the defendant examined the machine, but then wrote the plaintiff that it was a very old one and had been mended, and was not what he expected and would be no use to him. Later he returned the machine to the plaintiff, and the latter sued the defendant for the agreed price of £21.

Decision

The **Divisional Court** held that there was a contract for sale by description, within the meaning of section 13 of the Act ; and that there had been no acceptance of the machine by the defendant under section 35 of the Act ; nor had the property passed to him under section 17 ; and therefore the plaintiff could not recover against him.

In his judgment, **CHANNELL, J.**, said, at p. 516 :—

“The term ‘sale of goods by description’ must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone. It applies in a case like the present, where the buyer has never seen the article sold, but has bought by the description. In that case, by the Sale of Goods Act, 1893, section 13, there is an implied condition that the goods shall correspond with the description, which is a different thing from a warranty. The most usual application of that section no doubt is to the case of unascertained goods, but I think it must also be applied to cases such as this, where there is no identification otherwise than by description. . . . Then when did the property pass? Not when the machine was put on the railway, for the vendor could not make the property pass by putting on the railway that which did not fulfil the implied condition. The earliest date therefore at which the property could be said to pass would be when the machine was accepted by the purchaser. But it never was accepted. . . . The result is that the defendant is entitled to judgment and the appeal must be allowed.”

NOTES

Description defines the article sold, and if it differs in any respect from the description “it is not the article bargained for, and the other party is not bound to take it. . . . If you contract to sell peas, you cannot oblige a party to take beans.” See Lord BLACKBURN, in *Bowes v. Shand* (1877), 2 App. Cas. 455, at p. 480.

In *Wallis, Son and Wells v. Pratt and Haynes*, [1911] A. C. 394, a firm agreed to sell "common English sainfoin" seed. On the sold note it was stated that "sellers give no warranty express or implied as to growth, description, or any other matters." The seed which they actually supplied turned out to be "giant sainfoin," a different and inferior seed. The buyers had resold it as "common English sainfoin," and had to pay their purchasers the difference in value between the two seeds. It was held that they could recover this sum from the sellers in spite of the wording of the sold note, for the seeds delivered were a different kind of goods, and of quite a different description, from those sold, and the words on the sold note did not cover such a case as that.

In *Couchman v. Hill*, [1947] 1 K. B. 534, a heifer was sold as un-served. In fact, it was in calf and died because it carried the calf at too young an age. The buyer was allowed damages. SCOTT, L.J., said, at p. 559, that every item in a description which constituted a substantial ingredient in the identity of the thing sold was a condition, although the condition could be waived by the buyer, who could then claim damages as for the breach of a warranty.

WARD v. HOBBS

(1878), 4 App. Cas. 13

On a sale of goods there is ordinarily no implied warranty as to the quality of the goods.

Facts of the Case

Hobbs sent 32 pigs to market to be sold by auction. One of the conditions of sale at the auction was that the lots, with all faults and errors of description (if any) were to be paid for and removed at the buyer's expense immediately after the sale : and another, that no warranty would be given by the auctioneer with any lot and no compensation made in respect of any fault or error of description. Hobbs gave no warranty with his pigs.

Ward bought the pigs for £44, a fair price for healthy pigs. While being driven to Ward's farm they exhibited signs of illness and all but one afterwards died of typhoid fever. Ward also lost some other pigs which he alleged became infected by Hobbs's pigs.

Ward sued Hobbs for damages. There was no express warranty, but Ward alleged an implied warranty by Hobbs that the pigs were free from infectious disease, and alleged that Hobbs knew they had the disease. Hobbs denied this. On appeal to the House of Lords it was urged on behalf of Ward that there was evidence that Hobbs knew the pigs were suffering from the disease

and also that it was illegal to send pigs to market with an infectious disease, and that by sending them, Hobbs must be taken to have represented that they had no such disease.

Decision

The **House of Lords** held that there was no implied warranty by Hobbs, and that even if he knew the pigs were infected, although his sending them to market was an offence, it did not amount to an implied representation that they were sound, and therefore Ward had no claim against Hobbs.

Lord O'HAGAN, in his judgment, said, at p. 26:—

"We must deal with the law as we find it, even though we might desire, in cases of bargain and sale, to compel more full and candid statements on peril of grave responsibility; and that law is stated thus by Judge STORY in his book on contracts: 'The general rule both of Law and Equity, in respect to concealment is, that mere silence with regard to a material fact which there is no legal obligation to divulge, will not avoid a contract, although it may operate as an injury to the party from whom it is concealed.' And again: 'Although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold, since that would amount to a positive fraud on the vendee; yet under the general doctrine of *caveat emptor*, he is not ordinarily bound to disclose every defect of which he may be cognisant, although his silence may operate virtually to deceive the vendee.' I take it that this is a correct statement; and, if so, as there was not in the present case any 'legal obligation' to divulge the knowledge assumed to belong to the defendant, his simple failure to divulge it did not nullify the contract, and could not be taken, as the appellant insists, either as a representation of the soundness of the animals, or as a representation that he did not know them to be unsound."

NOTES

The Sale of Goods Act, 1893, now provides that in certain cases on the sale of goods there are implied conditions with reference to the quality of the goods. (See sections 14 and 15.)

In a few other cases, implied warranties are introduced by particular Statutes, such as the Merchandise Marks Act, 1887, section 17; the Anchors and Chain Cables Act, 1899, section 2; and the Fertilisers and Feeding Stuffs Act, 1926, sections 1 and 2.

But save in these cases, the rule still prevails that on the sale of goods there is no implied condition or warranty as to the quality of the goods, the doctrine of *caveat emptor* applying. (See Sale of Goods Act, 1893, section 14.)

From a warranty of quality of the thing sold must however be distinguished the warranty of description. In *Barr v. Gibson* (1838), 3 M. & W. 390, a ship was sold. At the time of the sale the vessel was stranded and likely to go to pieces. The buyer contended that the seller had broken a warranty that the vessel was serviceable as a ship. But it was found in evidence that at the time of the sale the ship was not a complete wreck, but still a ship, and that accordingly the seller had committed no breach of warranty. PARKE, B., after explaining that the seller did not warrant the quality of the thing sold, said, at p. 399:—

“ But the bargain and sale of a chattel, *as being of a particular description*, does imply a contract that the article sold is of *that description* . . . and therefore the sale in this case of *a ship*, implies a contract that the subject of the transfer did exist in the character of a ship. . . . That covenant, therefore, was broken, if the subject of the transfer had been, at the time of the covenant, physically destroyed, or had ceased to answer the designation of a ship; but if it still bore that character, there was no breach of the covenant in question, although the ship was damaged, unseaworthy, or incapable of being beneficially employed.”

FROST v. AYLESBURY DAIRY CO., LTD.,

[1905] 1 K. B. 608

Where the buyer of goods expressly or by implication makes known to the seller the particular purpose for which he requires the goods so as to show that he relies on the seller's skill or judgment, and the goods are of a kind which it is in the course of the seller's business to supply, there is an implied condition under section 14 (1) of the Sale of Goods Act, 1893, that the goods shall be reasonably fit for such purpose.

Facts of the Case

The defendants were milk dealers and supplied the plaintiff with milk, which was consumed by him and his family. A book was supplied to the plaintiff and in this the daily supplies were entered. This book contained a notice as to the precautions taken by the defendants to ensure that the milk supplied was pure and free from all germs of disease and from adulteration.

The plaintiff's wife contracted typhoid fever, from which she died, and the plaintiff alleged that she got the fever from germs in the milk supplied by the defendants, and he sued the defendants

for damages in respect of the expenses to which he had been put by reason of his wife's illness and death, alleging that the milk was infected with typhoid germs and was not reasonably fit for the purpose for which it was required, namely, human consumption. The existence of the germs in the milk could only be discovered by prolonged investigation.

The jury found that the milk was infected, and was the cause of the fever, and returned a verdict for the plaintiff, for whom judgment was entered. The defendants appealed.

Decision

The **Court of Appeal** held that the purpose for which the milk was required, namely, consumption by the plaintiff and his family, was conveyed to the defendants by implication; that there was evidence that the plaintiff relied on the skill of the defendants and therefore there was an implied condition under the Sale of Goods Act, section 14 (1), that the milk was reasonably fit for consumption even though the defect in the milk (namely, the existence of the germs) could not have been discovered at the actual time of supply, and the defendants' appeal was dismissed.

MATHEW, L.J., said, at p. 614:—

"It is said, and in my opinion correctly said, on behalf of the plaintiff, that the particular purpose for which the milk was required was conveyed by implication. It was to be used in the ordinary way for the purpose of consumption, and was supplied for that purpose, and there seems to me to be no doubt that the purpose for which the purchase was made was conveyed by implication to the seller. The section continues with the words, 'so as to show that the buyer relies on the seller's skill or judgment'; the word 'skill' is sufficient for the purpose of this case. In the ordinary course milk is supplied without any inspection. It is delivered by the seller at the buyer's house, and there is no suggestion that any judgment can be exercised by the buyer in respect of it. Every effort was made on the part of the sellers to give an assurance to the buyer that their skill could be relied on, and they pointed out all the precautions which they take to secure that the article shall be free from adulteration or contamination. It seems to me, under these circumstances, that the terms of the section are applicable to this case, and dispose of the point of law in favour of the plaintiff."

NOTES

In the earlier case of *Preist v. Last*, [1903] 2 K. B. 148, the purchaser of a hot-water bottle was told by the seller that it was suitable for hot water, but not for boiling water. When his wife

used it, it burst, and she was scalded. It was held that this case came within s. 14 (1) of the Sale of Goods Act, and that the purchaser could recover from the seller expenses incurred for treatment of his wife's injuries.

In the case of *Gedding v. Marsh*, [1920] 1 K. B. 668, the defendant supplied cases of mineral waters in bottles to the plaintiff, and when the plaintiff was putting one of the bottles into a case, it burst in her hands and injured her. The bottles did not become the buyer's property on the sale, but only the contents, but it was held, nevertheless, that the bottles were "supplied under a contract of sale," and that the section applied, and there was an implied condition that the bottles, as well as the contents, should be reasonably fit for the purpose for which they were required, and that the plaintiff could recover damages from the defendant.

A proviso to this section (namely s. 14 (1)) enacts that in the case of a contract for the sale of a specified article under its *patent or other trade name*, there is no implied condition as to its fitness for any particular purpose. But even in this case, if the buyer indicates to the seller that he relies on the seller's skill or judgment as to the article being fit for a particular purpose, then the section will still apply, and there will be an implied condition on the part of the seller that the article is reasonably fit for that purpose. See *Baldry v. Marshall*, [1925] 1 K. B. 266. In that case the plaintiff desired to buy a motor car from the defendants, who were motor car dealers. He told them that what he wanted was a comfortable car suitable for touring purposes, and the defendants thereupon recommended a "Bugatti car," a specimen of which they showed to the plaintiff. The latter then ordered "an eight cylinder Bugatti car," and it was agreed that the defendants should guarantee the car for twelve months against defects of manufacture. An eight cylinder Bugatti car was delivered to the plaintiff, but proved uncomfortable and unsuitable for touring purposes. The plaintiff thereupon claimed to reject the car and to recover back the purchase price, which he had paid to the defendants. It was held by the Court of Appeal that he was entitled to do so. The relationship between s. 14 (1) and the proviso was explained in this way. The mere fact of an article being sold under its trade name, in the sense that the latter forms part of the description of the thing sold, does not necessarily bring the case within the proviso so as to exclude the implied condition of fitness for a particular purpose. If the buyer, while asking to be supplied with an article of a named make, indicates to the seller that he relies on his skill and judgment for its being fit for a particular purpose, he does not buy it "under its trade name" within the meaning of the proviso. This did not apply in the present case, and the defendants were liable. Indeed the proviso applies only to cases where the buyer, without consulting the seller, himself relies on the trade name, which is then substituted for the seller's skill or judgment. Moreover, there is still the usual implied condition that the goods sold are what

they purport to be, so that the seller of a bottle labelled "Bass's Beer" will be liable if the bottle contains an irritant poison by mistake, and the plaintiff is injured by drinking some of it. See *Davis v. Miller* (1894), 10 T. L. R. 286. See also Stevens' Elements of Mercantile Law, 10th Edn., p. 304 *et seq.*

In addition to contracts of sale the skill or judgment rule applies also to contracts for work and supply of materials. For instance, a person instructing a garage to repair his motor car relies on the mechanic's skill or judgment, and the latter is liable, as under a contract of sale. See *Myers (G. H.) & Co. v. Brent Cross Service Co.*, [1934] 1 K. B. 46.

JACKSON v. ROTAX MOTOR AND CYCLE CO.,
[1910] 2 K. B. 937

Meaning of "merchantable quality" under the Sale of Goods Act, 1893 (Section 14 (2)).

Facts of the Case

The defendants ordered 600 odd motor horns of slightly varying descriptions from the plaintiff, at agreed prices, delivery to be as required. It was a sale of goods by description, and the plaintiff dealt in goods of that description and therefore by s. 14 (2) of the Sale of Goods Act, there was an implied condition that the goods should be of merchantable quality.

The first delivery comprised cases 1 to 4, and the defendants accepted case 2 and paid the plaintiff for it, but claimed to reject the other 3 cases, and also the remaining 15 cases delivered subsequently, on the ground mainly that the goods were not of merchantable quality, because a large number of them were dented, badly polished, badly finished, and otherwise of faulty manufacture.

The plaintiff sued for the price of all the goods, less case 2, already paid for, and the action was referred to an Official Referee, who found that there were some defects, but that the goods, as an entire consignment, were not unmerchantable. He allowed the defendants a small reduction and gave judgment for the plaintiff for the balance of their claim. The defendants appealed to the Divisional Court and that Court dismissed the appeal, and said that the words "merchantable quality" in the Sale of Goods Act did not mean the same thing as "immediately saleable," and that goods might be of merchantable quality even though some little thing further was required to be done to make them saleable. The defendants then appealed to the Court of Appeal.

Decision

The **Court of Appeal** held that, under this particular contract, the acceptance by the defendants of the first delivery did not preclude them from rejecting the later deliveries, and that they were justified in rejecting these as being unmerchantable, and the Court allowed the appeal.

COZENS-HARDY, M.R., said, at p. 943:—

“ The Divisional Court put what so far as I am aware is an entirely new meaning on the word ‘ merchantable,’ namely, that goods are ‘ merchantable’ if they only want some trifling thing done to make them immediately saleable—that they are to be considered as merchantable, although not immediately saleable, and although a further expenditure of money is required by the purchaser to make them saleable. I am not aware of any authority for that view. It seems to me to be inconsistent with the language of the Sale of Goods Act.”

And later he said, at p. 945:—

“ It is true that a large proportion of the goods were merchantable, but that does not justify an action by the vendor for the price of the goods unless he can prove that he was ready and willing to deliver and had delivered or had tendered all the goods in a merchantable condition and of the quality required, subject, of course, to the qualification, if it be necessary to mention it, that the law does not regard as an exception that to which the rule of *de minimis* can apply.”

And KENNEDY, L.J., said, at p. 949:—

“ There was here a substantial failure on the part of the seller to deliver goods of a merchantable quality and . . . the buyers were entitled to treat this as one contract and to reject the goods. They were not bound to go picking and choosing. The seller cannot say ‘ Pick out the various portions which are good and pay for those . . . ’ ”

It was agreed that the plaintiff should keep the price of cases 1, 3 and 4 (comprised in the first delivery) which the defendants had paid into Court with a denial of liability, and the Court of Appeal then allowed the defendants’ appeal as to the remainder of the deliveries.

NOTES

In the case of *Sumner, Permain & Co. v. Webb & Co.*, [1922] 1 K. B. 55, the defendants, who were manufacturers of mineral water, sold to the plaintiffs tonic water under the description of “ Webb’s Indian Tonic.” The defendants knew the water was being bought to be shipped to the Argentine. Among the ingredients of the water

there was, unknown to the plaintiffs, a certain percentage of salicylic acid. By a law of the Argentine, the sale of any article of food or drink containing salicylic acid was forbidden, but the defendants did not know that. When the water arrived at the Argentine, the authorities, on finding that it contained salicylic acid, condemned it. The plaintiffs then sued the defendants for damages (*inter alia*) for breach of the condition implied under s. 14 (2) of the Sale of Goods Act, that the water should be of merchantable quality. The Court of Appeal decided that the fact that by reason of the Argentine Law the water was unsaleable in that country did not amount to a breach by the defendants of the implied condition as to merchantable quality.

In *Morelli v. Fitch and Gibbons*, [1928] 2 K. B. 636, the plaintiff asked for and purchased a bottle of Stone's Ginger Wine at the defendants' public-house. When he got home he was attempting to draw the cork with a corkscrew, when the neck of the bottle came away from the bottle, the bottle fell to the ground, and the plaintiff's hand was cut. It was held by the Divisional Court (affirming the Judge of the County Court) that this was a sale by description, and that the bottle was not of merchantable quality as required by s. 14 (2) of the Sale of Goods Act, and therefore the plaintiff was entitled to recover damages.

DANGEROUS GOODS

(1) **CLARKE AND WIFE v. ARMY AND NAVY CO-OPERATIVE SOCIETY, LTD.,**

[1903] 1 K. B. 155

(2) **DONOOGHUE v. STEVENSON,**

[1932] A. C. 562

On a sale of goods in a dangerous condition, the seller if he knows of the danger must warn the buyer, unless the buyer already knows of the danger.

Facts of the First Case

The defendants were the owners of co-operative stores, and Clarke was one of their ticket-holders. His wife went to the branch store of the defendants at Plymouth and asked for some chloride of lime for disinfecting purposes. An assistant recommended her to have chlorinated lime, which was sold in powder form in tins. She bought a tin. No warning was given to her of any danger.

The next day she opened the tin by prising the lid up in the usual way, and thereupon a portion of the contents of the tin flew up in the air and some of the powder went into her eyes and injured her.

The defendants' rules, published in their price-lists supplied to ticket-holders, contained a clause as follows :—" No warranties are given with the goods sold by the Society, except on the written authority of one of the managing directors or the assistant manager."

It appeared that the tin formed one of a consignment of 18 similar tins supplied to the Plymouth store, 11 of which were sold. Three of them were sold to Mrs. Stebbing, who had a similar accident in opening one of them. This was before the sale to Clarke's wife. Other tins had been sold to two other ladies, who had similar accidents. The defendants did not admit that these latter tins formed part of the same consignment. When the accident happened to Mrs. S., her husband wrote to the defendants' manager at Plymouth, who then gave instructions to his assistants that a warning should be given to purchasers of similar tins as to the need for care in opening them.

Clarke and his wife sued the defendants for damages. The jury found that the tins were badly constructed, and conducive to danger, and that, having had warning from S., the defendants were negligent in not taking steps to stop further accidents, and they awarded the plaintiffs, Clarke and his wife, damages. The defendants appealed.

Decision in the First Case

It was held by the **Court of Appeal** that quite apart from any question of implied condition or warranty, there is a duty cast upon the seller of goods who knows of the dangerous character of the goods which he is supplying (and also knows that the buyer may not be aware of it) to warn the buyer of that danger, and that the clause in the defendants' rules did not affect that duty. The defendants' appeal was therefore dismissed.

In the course of his judgment, ROMER, L.J., said, at p. 166 :—

" It appears to me sufficient that the defendants' manager knew that the tins were dangerous in the sense that special care was required in opening them, and, that being so, I think there was a duty imposed on the defendants through him to warn the plaintiff that such care was requisite; and, that duty not having been performed, and the plaintiff having thereby been injured, the defendants are liable. I think that, apart from any question of warranty, there is a duty cast upon a vendor, who knows of the dangerous character of goods which he is supplying, and also

knows that the purchaser is not, or may not be, aware of it, not to supply the goods without giving some warning to the purchaser of that danger. Of course that duty may be rebutted by special circumstances. . . . But, apart from special circumstances, I think such a duty exists. That duty being cast on a vendor, he is not relieved from it by employing a servant who either does not know of the danger, or does not choose to comply with his instructions to warn customers, or forgets them."

Facts of the Second Case

The appellant and a friend went to a café, where the friend bought a bottle of ginger beer, manufactured by the respondent. The appellant consumed some of the beer, and when she poured out the rest of the bottle a snail, which was in a state of decomposition, floated out into her tumbler. The appellant was sick and suffered from shock and gastro-enteritis. The bottle was made of dark opaque glass, and the beer was bottled and sealed by the respondent. The appellant sued the respondent in effect for negligence in the performance of a duty which he alleged was owed to the consumers by the manufacturer of the ginger beer to provide a reasonably safe system of working his business which would prevent snails from getting into the ginger-beer bottles.

Decision in the Second Case

The **House of Lords** held that there was *prima facie* evidence of negligence. The manufacturer of an article of food, medicine or the like, sold by him to a distributor in circumstances which prevent the latter or the consumer from discovering any defect by reasonable inspection, is under a duty to the consumer to take reasonable care that the article is free from defect likely to cause injury to health.

Lord MACMILLAN said, at p. 619:—

"For a manufacturer of aerated water to store his empty bottles in a place where snails can get access to them, and to fill his bottles without taking any adequate precautions by inspection or otherwise to ensure that they contain no deleterious foreign matter, may reasonably be characterised as carelessness. . . . But . . . it is not enough to prove the respondent to be careless in his process of manufacture. The question is: Does he owe a duty to take care, and to whom does he owe that duty? Now I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles. . . . He places himself in a relationship with all the potential consumers of his commodities,

and that relationship which he assumes and desires for his own ends imposes upon him a duty to take care to avoid injuring them. . . . It may be a good general rule to regard responsibility as ceasing when control ceases. So, also, where between the manufacturer and the user there is interposed a party who has the means and opportunity of examining the manufacturer's product before he re-issues it to the actual user. But where, as in the present case, the article of consumption is so prepared as to be intended to reach the consumer in the condition in which it leaves the manufacturer, and the manufacturer takes steps to ensure this by sealing or otherwise closing the container so that the contents cannot be tampered with, I regard his control as remaining effective until the article reaches the consumer and the container is opened by him."

NOTES

In these cases we are dealing not with breach of contract but with tort. The importance of this lies in the fact that it may furnish a remedy to a purchaser whose contract is so worded as to deprive him of a remedy for breach of contract (as in *Clarke's Case*) or even to a third party who was not in contractual relationship with the vendor at all (as in *Donoghue's Case*). With the rapid growth of the supply of manufactured goods to the consumer in sealed packets, tins, and other types of container this latter type of case is likely to become of increasing importance. The reasons are partly legal and partly of a business nature. The Sale of Goods Act, 1893, provides, as the previous cases show, a number of implied conditions of fitness and quality of goods, the most important of which is that goods sold must be of merchantable quality. However, there is nothing to prevent sellers from excluding the statutory conditions, and this is often done, with the result that buyers may have no remedies against sellers. Moreover, it often happens that goods bought by one person are consumed by another who suffers injury by reason of their defective quality. In such a case there is no contractual relationship with the shopkeeper. Again, the purchaser himself may wish to bring an action against somebody of more substance than the shopkeeper. In some circumstances it may be possible to look beyond the retailer to the manufacturer for redress.

The buyer cannot, of course, sue the manufacturer in contract, but it may be possible to sue him in tort, that is for an unlawful act, and the tort will usually be that of negligence. Negligence has been defined as "the absence of such care as it was the duty of the defendant to use" (Willes, J., in *Grill v. General Iron Screw Collier Co.* (1866), 1 C. P. 612), and Brett, M.R., laid down (*Heaven v. Pender* (1883), 11 Q. B. D., at p. 507) that "actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which

neglect the plaintiff . . . has suffered injury to his person or property." It follows that anybody wishing to sue a manufacturer must prove (i) that he owed him a duty of care, (ii) that the necessary care was not taken in the manufacturing process, and (iii) that by reason of this breach of duty he has suffered injury. With regard to (i) it has been decided in *Donoghue v. Stevenson* that a manufacturer does in principle owe a duty to anybody who in the ordinary way comes into contact with the manufactured article, though the precise limits of this proposition have so far not been laid down, and will probably always remain uncertain as every decision must depend on the facts of the case. As regards (ii) this will of course largely depend on the evidence. But in circumstances like these, owing to the principle of *res ipsa loquitur*, the burden of proof will be on the manufacturer to show that the process of manufacture was conducted without negligence. The (iii) proposition will be defeated by the manufacturer showing that somebody through whose hands the goods have passed on their way to the consumer, or the latter himself, might have discovered the defect if they had been reasonably diligent. If this possibility of discovery existed the manufacturer's negligence did not cause the injury. Apart from *Donoghue v. Stevenson* the most important case where the manufacturer was held liable was *Grant v. Australian Knitting Mills*, [1936] A. C. 85. In that case the plaintiff had bought woollen underwear in a shop, and, owing to some chemical substance in the garment, contracted a skin disease. It was held that the manufacturer was liable since the shopkeeper who sold the goods had not the means of discovering the defect.

On the other hand, where a "bull-ring" broke owing to a defect in the manufacturing process the action was dismissed; for on the evidence it would have been reasonably possible to test the ring before use after it had left the factory, and thus prevent the accident: *Dransfield v. British Insulated Cables, Ltd.* (1937), 54 T. L. R. 11. Again in the case of *Blacker v. Lake and Elliot Ltd.* (1912), 106 L. T. 533, the plaintiff purchased a brazing lamp from a retailer, to whom it had been supplied by the defendants, the manufacturers. The lamp worked quite all right for nearly a year, but then exploded in consequence of a defective joint and the plaintiff was injured. He now claimed damages from the defendants. It was held by the Divisional Court that there was no evidence on which it could be found that the lamp was a dangerous object or in a dangerous condition so as to impose on the defendants a duty to give a warning when they supplied it, and the Court entered judgment for the defendants. The Court also decided that the question whether an article was dangerous, so as to impose a liability on the manufacturer towards persons using it, was a question of law to be decided by the Judge. And LUSH, J., also said that where an article was dangerous, the manufacturer was under a duty to warn the person to whom he supplied it, and if he failed to do so, that might render him liable for injuries to the person to whom he supplied it, or to a third person into whose hands he ought to contemplate it might come.

ACQUISITION OF TITLE FROM PERSON OTHER THAN OWNER

CAHN AND MAYER *v.* POCKETT'S BRISTOL CHANNEL STEAM PACKET CO. LTD.,

[1899] 1 Q. B. 643

The purchaser of goods from a person, not the owner, acquires a good title, if the seller had acquired possession of the goods or a document of title thereto with the consent of the owner.

Facts of the Case

Steinmann & Co., of Liverpool, on July 12th contracted to sell to Pintscher, a merchant in Altona, ten tons of copper to be delivered c.i.f. Rotterdam, payment to be made by the latter accepting bills of exchange within thirty days of the date of the bill of lading. On August 27th Pintscher resold the goods to the plaintiffs. When on September 1st Pintscher received the bill of lading and the bill of exchange for his acceptance, he was insolvent. Pintscher did not accept the bill of exchange, but handed the bill of lading to his bankers with instructions to forward it to the plaintiff, and to credit the purchase price, to be received from the plaintiff, to his, Pintscher's, account, which was overdrawn. On September 2nd these instructions were carried out. The plaintiff took the bill of lading in good faith and without notice of the rights of Steinmann & Co. in respect of the copper. When Steinmann & Co. heard of Pintscher's insolvency they stopped *in transitu* the goods which were in the possession of the defendants as carriers. The plaintiffs thereupon demanded the goods from the defendants.

Decision

The **Court of Appeal** held that since the buyer (Pintscher) had obtained possession of the bill of lading with the consent of the sellers (Steinmann & Co.), the transfer by him to the plaintiffs gave the latter a good title to the copper under s. 25 (2), Sale of Goods Act, 1893. The sellers had no right to stop the goods in transit.

A. L. SMITH, L.J., said, at p. 654:—

“The bill of lading was not obtained by Pintscher from Steinmann & Co. by any trick or device, in which case it could not be said that Pintscher had obtained the actual custody of it with Steinmann & Co.'s consent.”

COLLINS, L.J., said, at p. 658 :—

" The Factors Act, 1889, s. 9, which is thus referred to, and as to part of it in terms again enacted in the Sale of Goods Act, is the last of a series of statutes whereby the Legislature has gradually enlarged the powers of persons in the actual possession of goods or documents of title, but without property therein to pass the property in the goods to *bona fide* purchasers. Possession of, not property in, the thing disposed of is the cardinal fact. From the point of view of the *bona fide* purchaser, the ostensible authority based on the fact of possession is the same whether there is property in the thing, or authority to deal with it in the person in possession at the time of the disposition or not. But the Legislature has not carried the rights of a purchaser under these Acts so far as to make the sale equivalent to a sale in market overt. The purchaser must accept the risk of his vendor having found or stolen the goods or documents, or otherwise got possession of them without the consent of the owner. . . . However fraudulent the person in actual custody may have been in obtaining the possession, provided it did not amount to larceny by a trick, and however grossly he may abuse the confidence reposed in him, or violate the mandate under which he got possession, he can by his disposition give a good title to the purchaser."

The defendants also relied on s. 19 (3), Sale of Goods Act, which provides that if a seller sends to the buyer a bill of exchange for acceptance together with the bill of lading, and the buyer fails to accept the bill of exchange, he is bound to return the bill of lading ; if he wrongfully retains it the property in the goods does not pass to the buyer. The Court held, however, that this section had no bearing on the case in hand, since it has nothing to do with the original obtaining of possession of the bill of lading or the goods.

COLLINS, L.J., said, at p. 662 :—

" Even when by electing not to accept the bill of exchange he (the buyer) has come under a duty to return the bill of lading, he is bailee of the bill of lading for that purpose with the consent of the owner."

'The section deals, not with what title the buyer can pass to a sub-buyer, but with what title the buyer can make against the seller.

NOTES

This case is a good illustration of the policy and working of the Factors Act and of s. 25 of the Sale of Goods Act, which were passed to deal with the common case of a buyer being led to assume from the fact

that he found the seller in possession of the goods that he had the right to sell them, a situation frequently exploited by fraudulent sellers of goods which they have stolen, or at any rate have no right to dispose of. These statutes deal only with two types of such case, *viz.* that of the agent in possession, and that of buyer or seller under an earlier transaction who has obtained or retained possession without any right to do so: but these are of great practical importance. In *Cahn v. Pockett*, above, the sub-buyers, Cahn & Mayer, bought from Pintscher in reliance on the document of title which Steinmann & Co. had allowed to pass into the hands of Pintscher, thus making him in effect their mercantile agent. It is only fair that in these circumstances the loss should be borne by Steinmann, who might have satisfied themselves beforehand about Pintscher's honesty and solvency.

Three points should be carefully noted in cases of this nature:—

(i) The owner of the goods must have really consented to the agent obtaining possession of the goods. Where the agent's fraud produced such a mistake in the mind of the owner as to prevent a contract coming into existence, as in the case of *Cundy v. Lindsay, supra*, p. 102, then the agent has not acquired possession with the consent of the owner, and no *bona fides* on the part of any third person will enable property to pass to him. This is larceny by a trick. On the other hand, if the agent by false pretences induces the owner to give him possession the contract is valid, though voidable, and if before avoidance the agent disposes of the goods to a *bona fide* purchaser for value, the latter acquires a good title. Thus in *London Jewellers, Ltd. v. Attenborough*, [1934] 2 K. B. 406, a fraudulent person represented to a jeweller that he could sell certain jewellery, and he induced the jeweller to entrust to him jewellery on approval. Before the fraud was discovered the swindler pledged the jewellery with a pawnbroker, who had no knowledge of the fraud. In an action by the jeweller against the pawnbroker for recovery of the jewellery, the Court of Appeal held that the swindler had obtained possession of the goods, not by a trick which would have barred a consent, but by false pretences, and was thus able to pass a good title to the *bona fide* pawnbroker. *GREER, L.J.*, applied *Folkes v. King*, [1922] 2 K. B. 348: "Where a man obtains possession with authority to sell, or to become the owner himself, and then sells, he cannot be treated as having obtained the goods by larceny by a trick." On the other hand, in *Lake v. Simmons, supra*, p. 105, the woman induced a mistake in the mind of the owner which was so fundamental that the possession she acquired was without the owner's consent. She did not represent that she wanted to sell the necklets to other persons. The jeweller accordingly could not be said to have entrusted the goods to the woman as his agent. The persons to whom she said she wanted to show the necklets were fictitious,

and her conduct amounted to a trick. This, not the owner's consent, caused her to obtain possession.

(ii) The third party must act *bona fide*, that is to say, must not know that his seller's title is defective.

(iii) The third party must have given value for the goods. If he acquired them, for instance, by way of gift, he would take them with the same defect in title as his predecessor.

HIRE PURCHASE AGREEMENT

HELBY v. MATTHEWS,

[1895] A. C. 471

An option to buy goods is not the same thing as an agreement to buy and if a person who is in possession of goods under a mere option to buy, sells or pledges the goods, the purchaser or pledgee does not get a good title.

Facts of the Case

By written agreement, Helby agreed to let a piano on hire to Brewster, who agreed to pay 10s. 6d. at once and the same in each succeeding month. The agreement provided that Brewster might terminate the hiring by delivering up the piano to Helby; that if Brewster should punctually pay 36 monthly instalments, making £18 18s. in all, the piano should become his property; but that until then, it should continue the property of Helby.

After paying a few instalments, Brewster pledged the piano with Matthews, a pawnbroker, as security for an advance. On discovering this, Helby demanded the piano from Matthews, but he refused to deliver it up.

Helby then brought this action against Matthews to recover the piano. In defence Matthews pleaded that under the written agreement Brewster had agreed to buy the piano from Helby and that as Brewster was in possession of it with Helby's consent, and Matthews had taken it from Brewster in good faith and without notice of any claim by Helby, the case came within section 9 of the Factors Act, 1889, and Matthews was protected.

Decision

On appeal the **House of Lords** decided that under the agreement Brewster had merely an option to buy the piano, and had not "agreed to buy" it, and therefore section 9 of the Factors Act,

1889, did not apply, and Helby was entitled to recover the piano from Matthews.

Lord HERSCHELL, L.C., said, at p. 475:—

“ An agreement to buy imports a legal obligation to buy. If there was no such legal obligation, there cannot, in my opinion, properly be said to have been an agreement. Where is any such legal obligation to be found? Brewster might buy, or not, just as he pleased. He did not agree to make 36 or any number of monthly payments. All that he undertook was to make the monthly payment of 10s. 6d. so long as he kept the piano. He had an option no doubt to buy it by continuing the stipulated payments for a sufficient length of time. If he had exercised that option he would have become the purchaser. I cannot see under these circumstances how he can be said either to have bought or agreed to buy the piano.”

NOTES

S. 9, of the Factors Act, 1889, on which the decision in this case turned, has been reproduced by s. 25 (2), of the Sale of Goods Act, 1893. The effect of this section is that where under an agreement to sell the buyer obtains possession of the goods with the seller's consent, he can pass a good title to anybody who purchases the same goods from him, provided such sub-purchaser has no knowledge of the first buyer's defect of title. Important points arise in this connection in hire-purchase agreements. Where, as in *Helby v. Matthews*, the hirer has the right to determine the contract at any time before payment of the last instalment, the contract is not an agreement to sell, because the hirer is not bound to buy. As Lord Herschell points out, he has only an option to do so. S. 25 (2) does not apply, for the hirer obtains possession not under an agreement to sell, but under a contract for hire. This distinction is purely one of legal logic not founded on the merits of the transaction. A person buying from a hirer under a determinable hire-purchase agreement is just as incapable of knowing the true position as is anybody buying from a person who has bought goods, is in possession of them, but has not yet acquired property for failing to pay the price. Nevertheless, as the law stands the distinction must be observed. It became apparent in *Lee v. Butler*, [1893] 2 Q. B. 318, where there was also what purported to be a hire-purchase agreement, under which, however, the hirer had no right to determine the hire, but was bound to pay all instalments and to acquire the property. The Court held that this was really a contract to sell by instalments, and therefore s. 25 (2) of the Act applied. In that case Hardy agreed to let some furniture to Lloyd under a hire-purchase agreement; Lloyd had no right to return the furniture and agreed to pay the instalments provided by the agreement, on payment of which the furniture was

to become her property. Before paying the last instalment she sold the furniture to Butler who took it in good faith and without notice that it did not belong to Lloyd. In the meantime Hardy had assigned all his interest under the hire-purchase agreement to Lee. Lee now claimed the furniture from Butler, but it was held that Lloyd was in possession of the furniture under an *agreement to buy*, and therefore when she sold it to Butler the transaction was covered by section 9 of the Factors Act, 1889, and Butler could keep the goods.

In the case of *Whiteley Ltd. v. Hilt*, [1918] 2 K. B. 808, the plaintiffs let a piano to Miss Nolan under a hire-purchase agreement, the effect of which was that she merely had an option to buy. It also contained a provision that if the plaintiffs re-took the piano under the terms of the agreement, Miss Nolan should have the right to resume the hiring on paying up the arrears and providing a guarantor. Before she had paid all the instalments, Miss Nolan sold the piano to Miss Hilt. At that time there were no arrears and nothing had been done to terminate the hiring. The plaintiffs sued Miss Hilt for the recovery of the piano or its full value, but it was held on the particular facts, that they could not claim the return of the piano, nor its full value, but only the balance of the instalments still to be paid under the agreement. Miss Hilt was quite willing to pay these, and had in fact paid them into Court.

It follows from the nature of a hire-purchase contract that the goods remain the property of the original owner until the option is exercised. The hirer can return them to him at any time before this stage is reached, and any provision in the contract preventing him from doing so in effect requires him to become a purchaser, and prevents the transaction from being one of hire-purchase.

Contracts where the price does not exceed one hundred pounds are regulated by the Hire-Purchase Act, 1938. Exceptionally the figure of one hundred pounds is reduced to fifty, *i.e.*, in the case of motor vehicles and railway rolling stock, and increased to five hundred, *i.e.*, in the case of livestock.

This important Act establishes a strict control over the method of making hire-purchase contracts, over their provisions, and over the enforcement of their terms. One kind of enforcement particularly, the recovery of goods by the owner when the hirer falls into arrears, gave rise to much hardship. Sections 10 and 11 of the Act remedy this. Under them the owners must first render the hirer's possession of the goods adverse by a request in writing to surrender them. Moreover, where arrears develop after one third of the hire purchase price has been paid the owner can no longer simply collect the goods but must bring an action in Court for their return. High-handed action by the owner in defiance of this provision entitles the hirer to recover any moneys he has paid to the owner under the agreement. In *Smart Bros., Ltd. v. Pratt*, [1940] 2 K. B. 498, it was held that a letter by the owners' solicitors to the hirer formally determining the hiring, requesting surrender, and foreshadowing an action in Court unless arrears

were made up by a certain day, was a proper notice under the Act.

The statute recognises and adopts the distinction laid down in *Helby v. Matthews* (supra) and *Lee v. Butler* (supra), but in regard to contracts for the sale of goods by instalments within the pecuniary limits established by the Act, normally one hundred pounds, provided there are to be five or more instalments, the same regulative system is applied as for hire-purchase contracts proper, *i.e.*, the sections of the statute govern both types of contract, except that naturally an instalment contract need not contain a provision under which the purchaser may terminate the contract and return the goods to the seller. Such instalment contracts are termed credit sales agreements. Agreements in the form of hire-purchase contracts have been used in connection with attempts to avoid the requirements of the Bills of Sale Acts in regard to form, attestation, registration, etc. See *Maas v. Pepper*, [1905] A. C. 102, *post*, p. 311; see Stevens' Elements of Mercantile Law, 10th Edn., p. 287.

STOPPAGE IN TRANSIT

BETHELL & CO. v. CLARK & CO.
(1888), 20 Q. B. D. 615

An unpaid seller of goods has a right to stop them in course of transit if the buyer is insolvent.

Facts of the Case

Goods were sold by Clark & Co., of Wolverhampton, to Tickle & Co., of London. The order for the goods did not state any place to which they were to be sent, but on June 28th, 1885, the purchasers wrote the vendors as follows: "Please consign the 10 hogsheads of hollowware to the 'Darling Downs' to Melbourne, loading in the East India Docks here." The vendors delivered the goods to the L. & N.W. Railway Co., to be forwarded to the ship, and on shipment by the railway company's agents, a mate's receipt was taken for the goods and forwarded to the purchasers.

The vendors heard that the purchasers were insolvent, and gave notice to the railway company to stop the delivery on board the ship, and the railway company sent this notice on to their agents, but it was too late to prevent the shipment.

The ship then proceeded to Melbourne with the goods on board, but before she arrived there, the vendors wrote the shipowners (Bethell & Co.), claiming the goods as their property. The pur-

chasers filed a petition in bankruptcy and a trustee was appointed to administer their estate, and a question arose whether the trustee or the vendors were entitled to the goods.

Decision

It was held by the **Court of Appeal**, affirming the decision of the **Queen's Bench Division**, that the vendors' right to stop the goods in transit continued until they arrived at Melbourne, and therefore the vendors were entitled to the goods.

LOPES, L.J., said, at p. 620:—

“ If the goods have so far reached the end of their journey, that they wait for new orders from the purchasers to put them again in motion, to communicate to them another substantive destination, and that without such orders they would remain stationary, the *transitus* is at an end. But where a place is fixed by the directions given by the buyer to the seller as the ultimate destination of the goods, and, *a fortiori*, if there is an express stipulation as to their destination in the contract of sale, the transit is not at an end until the goods reach that place. Applying that rule to the present case, the only directions as to the destination of the goods were given by the vendees to the vendors by the letter of June 28th; and the case seems to depend on the true construction of that letter. I can only read the terms of it as meaning that the goods were to be consigned to the shipowners to be forwarded to Melbourne. If that is so, it is obvious that no fresh orders were required from the purchasers as to the ultimate destination of the goods, and, until they reached Melbourne, the *transitus*, and therefore the right to stop *in transitu* would continue.”

NOTES

Other cases in which a vendor successfully exercised his right of stoppage *in transitu* were *Ex parte Rosevear China Clay Co., Re Cock* (1879), 11 Ch. D. 560, and *Lyons v. Hoffnung* (1890), 15 App. Cas. 391.

But in *Kendall v. Marshall, Stevens & Co.* (1883), 11 Q. B. D. 356, Loeffler bought goods from Ward & Co. at Bolton, nothing being said as to place of delivery. Afterwards L. arranged with the defendants that the goods should be sent by steamer from Garston to Rouen and instructed W. & Co. to send the goods to the defendants at Garston. W. & Co. sent them accordingly by rail. The railway company gave notice to the defendants of the arrival of the goods at Garston, and that they would hold them as warehousemen. L. then filed a petition for liquidation of his affairs by arrangement. He had not paid W. & Co. for the goods. Thereupon W. & Co. stopped delivery of the goods, and the defendants returned them to

him. The trustee in L.'s liquidation sued the defendants and W. & Co. for the value of the goods. It was held that the transit ceased when the goods reached Garston and came into the defendants' possession as forwarding agents for L., and that W. & Co.'s right of stoppage *in transitu* was then at an end, and so L.'s trustee was entitled to recover the value of the goods. It will be seen that this is quite consistent with the principles laid down in the above case of *Bethell v. Clark*.

PASSING OF PROPERTY

ALDRIDGE *v.* JOHNSON

(1857), 7 E. & B. 885

In order that the property in unascertained goods sold by description may pass from the seller to the buyer it is necessary that goods of that description and in a deliverable state should be unconditionally appropriated to the contract.

Facts of the Case

The plaintiff agreed to buy from Knights 100 out of 200 quarters of barley which the plaintiff had seen in bulk and approved of. It was agreed that the plaintiff should send sacks, that Knights should fill the barley into them and send them to the railway for carriage to the plaintiff. Two hundred sacks were sent to Knights, and the latter filled 155 of them, which was part only of the 100 quarters bought by the plaintiff. The latter frequently demanded the barley from Knights, who could not procure any trucks to carry the sacks to the plaintiff. Finally he got into financial difficulties and emptied the barley from the sacks into the bulk. The defendant, who was Knights' assignee in bankruptcy, removed the whole of the barley, and the plaintiff sued him for conversion, claiming that it had already become his property.

Decision

It was held that so much of the barley as had been filled into the sacks had been unconditionally appropriated to the contract and the property in it had passed to the plaintiff, so that the taking away of the barley by the defendant, though again in bulk, was an interference with the plaintiff's property, and amounted to conversion.

NOTES

'The rule is now laid down in s. 18, rule 5, of the Sale of Goods Act, for the full terms of which see Stevens' Elements of Mercantile Law, 10th Edn., p. 331.

The buyer's assent to the appropriation which is a necessary condition can be express or implied. This was decided in *Pignataro v. Gilroy*, [1919] 1 K. B. 459. In that case the defendant sold to the plaintiff by sample 140 bags of rice, to be delivered within a fortnight. Accordingly, when the time was up, the defendant informed the plaintiff that he could take delivery of 15 bags at his place of business as agreed. The plaintiff did not call for them until nearly four weeks later, by which time the rice had been stolen without the fault of the defendant. The plaintiff claimed a refund of the price he had paid in respect of the 15 bags, but the Court held that risk and property in the 15 bags had passed to the plaintiff. There was no doubt that they had been unconditionally appropriated to the contract. To this the plaintiff had subsequently assented by not doing anything after he had received notice of the appropriation.

MEASURE OF DAMAGES

WILLIAMS BROS. v. E. T. AGIUS, LTD.,
[1914] A. C. 510

Where the seller of goods fails to deliver them, the measure of damages recoverable by the buyer is the difference between the contract price of the goods and the market price at the time when the goods ought to have been delivered, if there is an available market.

Facts of the Case

Agius Ltd. agreed to sell to Williams Brothers six cargoes of 4,000 to 5,000 tons of a certain kind of coal, at 16s. 3d. per ton c.i.f. Genoa or certain other ports, deliveries every alternate month, commencing January, 1911. In October, 1911, W. Brothers contracted to sell to G. one cargo of the same coal and same quantity, at 19s. per ton, by a sold note which contained this clause: "Sellers have no obligation to deliver this cargo unless they get delivery of a similar cargo due to them by Messrs. Agius of London." In November, 1911, G. sold his rights under this contract to Agius Ltd.

A. Ltd. failed to deliver the cargo which should have been shipped in November, 1911, and at that date the market price of the same coal was 23s. 6d. per ton. W. Brothers claimed

damages from A. Ltd. for breach of contract, and contended that the proper measure of damages was the difference between their contract price, 16s. 3d., and the market price, 23s. 6d. per ton. A. Ltd. claimed that the measure of damages was simply the difference between 16s. 3d. and the price at which W. Brothers had re-sold the particular cargo to G., namely 19s. per ton. The matter went to arbitration and ultimately, on appeal, came before the **House of Lords**.

Decision

The **House of Lords** decided that W. Brothers were right in their contention.

Lord MOULTON, after referring to the case of *Rodocanachi v. Milburn* (1886), 18 Q. B. D. 67, said:—

“ That case rests on the sound ground that it is immaterial what the buyer is intending to do with the purchased goods. He is entitled to recover the expense of putting himself into the position of having those goods, and this he can do by going into the market and purchasing them at the market price. To do so he must pay a sum which is larger than that which he would have had to pay under the contract by the difference between the two prices. This difference is therefore the true measure of his loss from the breach, for it is that which it will cost him to put himself in the same position as if the contract had been fulfilled.”

Lord MOULTON then went on to consider another contention of A. Ltd., that they had become assignees from G. of the original contract between themselves and W. Brothers, as regards the delivery in respect of which they (A. Ltd.) had now made default, and expressed his opinion that there was no such assignment.

NOTES

Section 51 of the Sale of Goods Act, 1893, enacts that where the seller wrongfully neglects or refuses to deliver goods the buyer may sue for damages, and the measure of damages is the estimated loss directly or naturally resulting in the ordinary course of events from the seller's breach of contract, and sub-s. (3) of the section provides:—

“ Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or if no time was fixed, then at the time of the refusal to deliver.”

In the case of *Rodocanachi v. Milburn* (1886), 18 Q. B. D. 67, where a cargo loaded on a ship was lost through the negligence of

the master of the ship, the Court held that the charterer as owner of the cargo, could recover damages from the shipowners based on the market value of the goods at the port of discharge, and was not limited to the price at which he had in fact agreed to sell the goods.

In the case of *Wertheim v. Chicoutimi Pulp Co.*, [1911] A. C. 301, the seller did not fail altogether to deliver, but was *late* in his delivery, and it was held that the measure of damages recoverable by the buyer under those circumstances was the difference between the market price at the date when the delivery was due and the price which the buyer actually got for the goods when they were delivered.

In *Slater v. Hoyle and Smith Ltd.*, [1920] 2 K. B. 11, the above cases of *Rodocanachi v. Milburn*, and *Williams Bros. v. E. T. Agius, Ltd.*, were followed, and it was held that the measure of damages recoverable in the case of breach of warranty as to the quality of goods sold, was the difference between the market value of the goods as described in the contract and the market value of the goods as actually delivered. (See also section 53 of the Sale of Goods Act, 1893.)

Reference should be made to the case of *Hadley v. Baxendale* (1854), 9 Ex. 341, dealt with on page 76.

The rule in *Williams v. Agius* was followed by the Court of Appeal in *The Arpad*, [1934] P. 189. The plaintiffs had bought wheat, which was sent to them on the defendant's ship. On delivery a quantity of wheat was missing, and the plaintiffs claimed damages the measure of which was alone in dispute. The original purchase price was 36s. per quarter, and the plaintiffs had resold at 36s. 6d. On arrival wheat prices had fallen to about 20s. It was found as a fact at the trial that there was no market for this particular quality of wheat, and that the price of the sub-sales, 36s. 6d., was the true measure of damages. It was also found that equally good wheat, though of a different kind, could be purchased at 23s. 6d. On the strength of this the Court of Appeal, SCRUTTON, L.J., dissenting, held that damages should be awarded on the basis of 23s. 6d. as the value of wheat at the date of non-delivery.

The rule of market price is however not of universal application, but in the words of the sub-section only *prima facie*. In some cases the loss of profit on a sub-sale may be taken into consideration in measuring the damages, even where there is an existing market. Thus in *Hall v. Pim* (1928), 33 Com. Cas. 324, it was held by the House of Lords that as between seller and buyer expected profits on sub-sales can be claimed if, when the goods were purchased, the sub-sale of the goods by the buyer was in the contemplation of the parties. However, in *The Arpad, supra*, the sub-sales were not allowed as evidence of damage, because, as GREER, L.J., put it, at p. 215,

"there is nothing in the bill of lading contract to call the attention of the shipowner to any question in any way relating to the sale of the goods by the shipper or his assignee."

RIGHT OF REJECTION

HARDY & CO. v. HILLERNS,
[1923] 2 K. B. 490

The buyer loses his right to reject goods, which are not in accordance with the conditions of the contract, if, after delivery, he accepts them either expressly or by doing some act which is inconsistent with the ownership of the seller.

Facts of the Case

The plaintiff sold to the defendants some 2,000 tons of Rosario and/or Santa Fé wheat c.i.f. Hull. The contract provided for disputes to be decided by arbitration. On March 18 the ship arrived and on March 20 the defendants (buyers) took up the documents. On March 21 the following incidents happened : (a) discharge was begun, and 1,877 qrs. were delivered to the defendants ; (b) the latter resold three lots of the wheat of 200 qrs., 100 qrs. and 500 qrs. respectively ; (c) the defendants also took samples and on examination suspected that the wheat was not up to the contract quality. Next day, on March 22, while the discharge was continued, further samples were taken, and it was found that the wheat was Entre Dios wheat, *i.e.* of a different description and a quality inferior to that agreed upon in the contract. Thereupon on March 23 the defendants rejected the wheat, but the plaintiffs claimed that they were no longer entitled to do so. Arbitration proceedings were commenced, and the arbitrator found that the wheat was indeed inferior to that which the plaintiffs were bound to supply under the contract. He also found that the defendants had acted properly in not rejecting on March 21, because the samples taken on that day were representative only of a small proportion of the contract quantity, and the defendants could not reasonably confirm their suspicions before March 22. It followed that from this point of view the notice of rejection on March 23 was in time. However, in case the Court should come to the conclusion that the defendants had no right to reject, the arbitrator found that the plaintiffs should refund to the defendants the sum of £543 2s. 10d. as the difference in the market price between the wheat contracted for and that actually delivered.

Decision

The **Court of Appeal** held that the defendants had lost their right to reject. By sub-selling parcels of the wheat the buyers had done something which was "inconsistent with the ownership of the sellers," within the meaning of s. 35, of the Sale of Goods Act, 1893, and they were thus deemed to have accepted. It was immaterial that the time between delivery and rejection was otherwise reasonable.

BANKES, L.J., said, at p. 495:—

"Sect. 34 gives a buyer to whom goods have been delivered, which he has not previously examined, a reasonable opportunity of examining them before he shall be deemed to have accepted them. Then sect. 35 provides as follows:— . . . I understand that to mean that if during the currency of the reasonable time within which the examination is to be made the buyer does certain things, one of which is an 'act in relation to (the goods) which is inconsistent with the ownership of the seller,' he shall be deemed to have accepted them. Sect. 35 is, in my opinion, independent of sect. 34, and it is quite immaterial for the purposes of that section that the reasonable time for examining the goods had not expired when the act was done."

It then became necessary to determine whether the buyers by their sub-sale had done anything inconsistent with the ownership of the sellers within s. 35. It was argued for the buyers that this section could not apply to a c.i.f. contract, since (p. 496)

"upon the bank taking up the shipping documents on March 20 the property passed to the buyers, and that consequently when they resold on the 21st there was no ownership left in the sellers with which that act of resale could be inconsistent. It seems to me that that is attempting to put a meaning on the language of the section which it cannot reasonably bear. I understand the section to refer to an act which is inconsistent with the seller being the owner at the material date; and the material date for the purposes of this case is not the date of the resale, but the date of the notice of rejection, upon receipt of which the ownership revested in the sellers. It is with that revested ownership that in my opinion the act of resale was inconsistent. And it was inconsistent with it for this reason: Where under a contract of sale goods are delivered to the buyer which are not in accordance with the contract, so that the buyer has a right to reject them, the seller upon receipt of notice of rejection is entitled to have the goods placed at his disposal so as to allow of his resuming possession forthwith, and if the buyer has done any act which prevents him from so resuming possession that act is necessarily inconsistent with his right. It is not enough

that the buyer should, as in the present case, be in a position to give the seller possession at some later date, he must be able to do so at the time of the rejection."

NOTES

It is clear that though the buyer has lost the right to reject the goods, he may still claim reduction of the purchase price on account of the inferior quality, see, e.g., *Benaim & Co. v. Debono*, [1924] A. C. 514, J. C. The reason for the strictness of the law is the same as set out above (p. 174) namely that the parties cannot, after acceptance, be put into the same position as they were before. Thus if we take up the explanation given when discussing conditions and warranties, (see p. 173, above) it may be said that in commercial sales it is not the passing of the property, but the acceptance which marks the time of execution, and after which the contract as a whole can no longer be repudiated.

There is another point which is brought out by this case. In the ordinary way property passes from the seller to the buyer by delivery, irrespective of the bill of lading. But if the buyer is entitled to reject the goods, and does reject them, the property reverts in the seller. For the rule as to passing of the property under contracts of sale see *Sale of Goods Act, 1893*, s. 11, and *Stevens' Elements of Mercantile Law*, 10th Edn., pp. 327 *et seq.*

NEGOTIABLE INSTRUMENTS

NEGOTIABILITY BY USAGE

**BECHUANALAND EXPLORATION CO. v.
LONDON TRADING BANK, LTD.,**

[1898] 2 Q. B. 658

Negotiable instruments by mercantile custom.

Facts of the Case

The plaintiffs had certain debentures of a company which they kept in a safe. Their secretary fraudulently removed the debentures from the safe and pledged them with the defendants as security for advances made to himself by the defendants. The defendants took the debentures in perfectly good faith, the

secretary being in the habit of dealing with securities for the plaintiffs, and on a previous occasion, in answer to an inquiry by the defendants as to the secretary's right to deposit certain shares against advances, the plaintiffs had assured the defendants of the honesty of the secretary.

The debentures which the secretary had now fraudulently pledged with the defendants were in form payable to bearer, or, when registered, to the registered holder for the time being. They had never been registered by the plaintiffs.

The plaintiffs now claimed the return of the debentures or their value and damages for detention. The defendants called evidence to show that debentures to bearer of a similar kind had been issued for many years by English companies and had always been treated in mercantile practice as negotiable instruments.

Decision

It was held that the debentures were negotiable instruments transferable by delivery, and that as the defendants had taken them in good faith and for value, the plaintiffs' claim failed.

In delivering judgment, KENNEDY, J., said:—

"Evidence, however, was adduced by the defendants of a usage of the mercantile world in recent times to treat debentures to bearer of this kind as negotiable instruments; and the defendants contend that if I am of opinion that the usage has been proved, I ought to recognise and give effect to it by upholding their title to these debentures. The plaintiffs contend that the usage has not been proved; they further contend as a matter of law that evidence of it was not properly receivable; that, even if the custom was proved, it cannot, being of recent introduction, be treated as part of that law merchant which courts of justice are bound to know and recognise. There are, therefore, to be decided two distinct questions—the first of fact, the second of law. Is there a usage of the mercantile world to treat such debentures as negotiable instruments, passing like promissory notes or bank-notes by mere delivery from hand to hand accordingly? If there is such a usage, ought it in a court of law to have the effect of attaching the quality or incident of negotiability to the contract contained in the debenture, so that the property in that chattel and all rights under it may upon delivery of it, be acquired by a person who becomes the holder? Upon the question of fact, I am of opinion that the defendants have sufficiently proved the usage of merchants which they sought to establish. . . . The effect of the evidence as a whole was, in my view, that such debentures as these had for many

years past been issued by English trading companies and circulated in the mercantile world as negotiable instruments passing from hand to hand accordingly."

His Lordship then considered the various authorities previously decided, and held that the debentures in this case had been proved by the defendants to have acquired the character of negotiable instruments by modern mercantile usage, and therefore he entered judgment for the defendants.

NOTES

In *Goodwin v. Robarts* (1876), 1 App. Cas. 476, G. purchased through his broker in England some Russian and some Hungarian scrip. In each case the scrip entitled the holder, on payment of certain instalments, to delivery of bonds. G. left the scrip in the hands of his broker to be exchanged for bonds or sold as he should direct, and the broker fraudulently deposited it with a banker as security for a loan to himself. The banker took it in good faith. In an action by G. against the banker, it was held that the scrip was a negotiable instrument transferable by delivery, and that the banker, being a *bona fide* holder for value, was not liable to G.

In the case of *Edelstein v. Schuler & Co.* [1902], 2 K. B. 144, the plaintiff possessed debenture bonds, some issued by an English company and others by foreign companies abroad, but all expressed to be payable to bearer. His clerk stole them and employed a broker to sell them. The broker instructed the defendants, who were members of the London Stock Exchange, and in good faith the defendants entered into contracts for the sale of the bonds to jobbers. The broker then sent the bonds to the defendants, and they handed them to the jobbers and remitted the price to the broker. The plaintiff sued the defendants for conversion of the bonds, but it was proved that, by usage of the mercantile world and the Stock Exchange, bonds of the kind in question were treated as negotiable instruments transferable by delivery, and it was held that the plaintiff's claim failed. In this case, BIGHAM, J., in giving judgment for the defendants, made the following important pronouncement:—

"In my opinion, the time has passed when the negotiability of bearer bonds, whether Government bonds or trading bonds, foreign or English, can be called in question in our courts. The existence of the usage has been so often proved and its convenience is so obvious that it must be taken now to be part of the law; the very expression 'bearer bond' connotes the idea of negotiability, so that the moment such bonds are issued to the public they rank themselves among the class of negotiable securities . . . I think that it is no longer necessary to tender evidence in support of the fact that such bonds are negotiable, and that the courts of law ought to take judicial notice of it."

THE HOLDER IN DUE COURSE

RAPHAEL v. BANK OF ENGLAND

(1855), 17 C. B. 161.

The meaning of taking in good faith.

Facts of the Case

On the 13th November, 1852, some bank-notes issued by the defendants were stolen from B. S. & Co., of Liverpool. Payment of the stolen notes was immediately stopped, and the loss advertised by handbills circulated in Liverpool, London and Paris. There was some evidence to show that one of these notices came into the possession of the plaintiff, St. Paul, in April, 1853.

St. Paul was a money-changer in Paris, and his firm were in the habit of changing English bank-notes every day. The other plaintiffs, Raphael, were the firm's correspondents in London. St. Paul gave evidence that he recollects taking a bank-note for £500 (one of the stolen notes) on the 25th or 26th June, 1854, from a person who came to the firm's shop. He said he asked the person for his passport, which he produced, and got him to write his name and address on the note, and he then cashed it for him in French money. It was the practice of his firm to file all notices of stolen or lost notes served on them, but St. Paul said that on this occasion he did not look at the file, and had no recollection of the notice, or he would not have taken the note.

The plaintiffs now sued the defendants for the amount of the note, £500, and interest. The defendants pleaded (*inter alia*) that the plaintiffs were not *bona fide* holders for value of the note, because they had notice of the fact that it was stolen. The jury found that St. Paul's firm did give value for the note; that they had notice of the robbery; that they had no knowledge of the loss at the time they took the note, but had the means of knowledge if they had properly taken care of it; and that they took the note *bona fide*. Judgment was entered for the plaintiffs, and the defendants appealed.

Decision

The **Court of Common Pleas** upheld this decision, and the appeal failed.

CRESSWELL, J., said :—

“ A person who takes a negotiable instrument *bona fide* for value has undoubtedly a good title, and is not affected by the want of title of the party from whom he takes it. His having the means of knowing that the security had been lost or stolen, and neglecting to avail himself thereof may amount to negligence ; and Lord TENTERDEN at one time thought negligence was an answer to the action. But the doctrine of *Gill v. Cubitt* (1824), 3 B. & C. 466, is not now approved of. I think, therefore, there is no reason to find fault with the verdict on that ground. Then, the jury have found, in substance, that the note in question was taken by St. Paul *bona fide* and for value. He could not have taken it *bona fide*, if at the time he took it he had notice or knowledge that the note was a stolen note. ‘ *Bona fide* ’ means ‘ really and truly for value.’ ”

And WILLES, J., said :—

“ They (the jury) should be told what *bona fide* means, viz., taking the note for value, and without knowledge of robbery . . . it is in truth a compendious way of expressing what the jury have found. That appears distinctly from the case of *May v. Chapman* (1847), 16 M. & W. 355, where it is laid down by PARKE, B., that ‘ notice and knowledge ’ means not merely express notice, but knowledge, or the means of knowledge, to which the party wilfully shuts his eyes—a *suspicion* in the mind of the party, and the means of knowledge in his power wilfully disregarded.”

NOTES

In *Jones v. Gordon* (1877), 2 App. Cas. 616, where a person had taken a bill, which had in fact been issued for a fraudulent purpose, at a gross undervalue and deliberately refrained from making inquiries, Lord BLACKBURN said, at p. 628 :—

“ I consider it to be fully and thoroughly established that if value be given for a bill of exchange, it is not enough to show that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong, when there were circumstances which might have led a man to suspect that. All these are matters which tend to show that there was dishonesty in not doing it, but they do not in themselves make a defence to an action upon a bill of exchange. I take it that in order to make such a defence, whether in the case of a party who is solvent and *sui juris*, or when it is sought to be proved against the estate of a bankrupt, it is necessary to show that the person who gave value for the bill, whether the value given be great or small, was affected with notice that there was something wrong

about it when he took it. I do not think it is necessary that he should have notice of what the particular wrong was. If a man, knowing that a bill was in the hands of a person who had no right to it, should happen to think that perhaps the man had stolen it, when if he had known the real truth he would have found, not that the man had stolen it, but that he had obtained it by false pretences, I think that would not make any difference if he knew that there was something wrong about it and took it. If he takes it in that way he takes it at his peril.

"But then I think that such evidence of carelessness or blindness as I have referred to may with other evidence be good evidence upon the question which, I take it, is the real one, whether he did know that there was something wrong in it. If he was (if I may use the phrase) honestly blundering and careless, and so took a bill of exchange or a bank-note when he ought not to have taken it, still he would be entitled to recover. But if the facts and circumstances are such that the jury . . . came to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind—I suspect there is something wrong, and if I ask questions and make further inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover—I think that is dishonesty."

Good faith is not the sole condition to be satisfied by the holder of a negotiable instrument which has been acquired from a person with a defective title. A person claiming protection must be a holder in due course, that is to say he must have "taken a bill complete and regular on the face of it, before it was overdue and without notice that it had been previously dishonoured, in good faith and for value, and without notice at the time the bill was negotiated to him of any defect in the title of the person who negotiated it." (s. 29 (1), Bills of Exchange Act, 1882). *Jenkins & Sons v. Coomber*, [1898] 2 Q. B. 168, is an example of a bill not being complete and regular on the face of it. There the bill was drawn to the drawer's order and handed to the defendant without indorsement. It was held that the defendant was not a holder in due course.

It should also be observed that the payee of a bill drawn to order cannot be a holder in due course. This was first decided by Lord RUSSELL, in *Lewis v. Clay*, 14 T. L. R. 149, *supra*, p. 99, but doubted by FLETCHER MOULTON, L.J., in *Lloyd's Bank v. Cooke*, [1907] 1 K. B. 794. The point has been settled by the decision of the House of Lords in *Jones v. Waring and Gillow*, [1926] A. C. 670. In that case Viscount CAVE, L.C., said at p. 680:—"I do not think that the expression 'holder in due course' includes the original payee of a

cheque. It is true that under the definition clause in the Act (s. 2) the word 'holder' includes the payee of a bill unless the context otherwise requires; but it appears from s. 29, sub-s. 1 that a 'holder in due course' is a person to whom a bill has been 'negotiated,' and from s. 31 that a bill is negotiated by being transferred from one person to another and (if payable to order) by indorsement and delivery. In view of these definitions it is difficult to see how the original payee of a cheque can be a 'holder in due course' within the meaning of the Act. Sect. 21, sub-s. 2, which distinguishes immediate from remote parties and includes a holder in due course among the latter, points to the same conclusion." While these words may seem somewhat legalistic, the reason for the decision is revealed by Lord SHAW OF DUNFERMLINE, who, at p. 687, said:—"It was never a negotiated cheque in the ordinary sense of that word or in the sense of s. 31 of the Bills of Exchange Act. The cheque never went into the circle by transfer or indorsation, and it is in these circumstances, in my opinion, inappropriate to use language as to 'a holder in due course' as applicable to the position of a direct payee of a cheque." In other words, a person enjoys the protection of the Act only if he is not one of the original parties to the bill, because there is no justification for original parties to a contract being granted this privilege. However, circumstances may exist in which a drawer is estopped from denying the validity of the document as between himself and the original payee, as where he had delivered a blank signature to another person who had filled it in with a larger amount than that indicated by the drawer, and had thus caused the payees to part with their money in reliance on the drawer's conduct. See *Lloyd's Bank, Ltd. v. Cooke, supra.*

HOLDER IN DUE COURSE AND HOLDER FOR VALUE**(1) LILLEY v. RANKIN**

(1886), 56 L. J. Q. B. 248

(2) WOOLF v. HAMILTON,

[1898] 2 Q. B. 337

The holder of a bill given in payment of debts incurred by losing bets or wagers not made on the result of games can recover in spite of the fact that he knows of the cause for which the bill was given; but if the bill

was given in payment of a bet on a game the holder can recover only if he had no notice of the fact that it was given in payment of gaming debts.

Facts of the First Case

The defendant and one Baird were engaged in Stock Exchange dealings which were admittedly gambling transactions. In settlement of his debts the defendant gave Baird two promissory notes, which the latter indorsed and delivered to the plaintiff for value. The plaintiff had notice of the facts, but his claim against Baird was in respect of a genuine business transaction.

Decision in the First Case

Judgment was given for the plaintiff, since it was held immaterial whether the plaintiff had or had not known that the notes had been drawn in payment of gambling transactions.

HUDDLESTON, B., said, at p. 816:—

“ Notice of the voidness of the consideration is no defence to an action on a bill or note if it be proved that the holder gave valuable consideration for the instruments, which is the present case.”

Facts of the Second Case

The defendant drew a cheque in favour of the payee in payment of bets lost on horse-races. The payee indorsed the cheque over to the plaintiff, who knew the facts. The defendant stopped payment of the cheque and the plaintiff sued.

Decision in the Second Case

It was held by the **Court of Appeal** that the cheque must be deemed to have been given for an illegal consideration, under the Gaming Act, 1835 (5 & 6 Will. 4, c. 41), and judgment was entered for the defendant.

A. L. SMITH, L.J., said, at p. 338:—

“ It has been held that horse-racing came within the provisions of 9 Anne, c. 14. It was expressly mentioned in the Statute 16 Charles 2, c. 7, and the authorities show that the same kind of games were covered by the Statute of Anne as by the Statute of Charles II. . . . If horse-racing was within the statute of Anne, the case is clear. By the Statute 5 & 6 Will. 4, c. 41, s. 1, so much of the statutes of Anne and Charles II as made notes, bills, or mortgages given as therein mentioned absolutely void

is repealed, and it is enacted that every note, bill, or mortgage which would have been by virtue of those Acts absolutely void shall, instead of being absolutely void, be deemed to have been made, drawn, accepted, given, or executed for an illegal consideration. The result of that enactment clearly is that a person who takes such a security for value, knowing for what consideration it was given, takes it with notice that it was given for an illegal consideration, and therefore cannot recover upon it. Consequently the judgment of the learned judge was right, and the appeal must be dismissed."

VAUGHAN WILLIAMS, L.J., at p. 339, quoted the words of Lord CAMPBELL, C.J., in *Hay v. Ayling* (1851), 16 Q. B. 423: "the illegality of the gaming consideration would be immaterial to a *bona fide* holder without notice of the consideration."

NOTES

As to the way in which the Gaming Acts influence Stock Exchange transactions themselves, see p. 325, *infra*.

In order to understand the decisions in the two cases it is necessary to bear in mind that whereas wagers generally are merely void under the Gaming Act, 1845, wagers on games and pastimes are deemed to be made for an illegal consideration under the Gaming Act, 1835. The difference is briefly this: debts falling into the former class only affect the immediate parties to the transaction, debts of the latter class affect also collateral transactions with third parties having knowledge of the facts. In other words, as between the original parties it is immaterial to which class the wager belongs, but once a third party is introduced, for instance as the indorsee of a bill, as in the two cases dealt with here, the distinction is relevant.

Moreover, a subsequent holder of a bill belonging to either class must show that value has been given by somebody before it has reached his hands, see *supra*, p. 208.

On the other hand, once a bill has originated from a genuine business transaction it seems that a subsequent endorsement of it for an illegal consideration does not affect the liability of the person originally liable. Thus where a bill was accepted for value, but later endorsed by the drawer for an illegal consideration the indorsee can sue the acceptor, but not the drawer: *Flower v. Sadler* (1882), 10 Q. B. D. 572.

CHARACTER OF A BILL OF EXCHANGE

**BAVINS, JUNR., AND SIMS v. LONDON AND
SOUTH WESTERN BANK, LTD.,**

[1900] 1 Q. B. 270

A Bill of Exchange, or Cheque, must be an unconditional order.

Facts of the Case

A railway company owed money to the plaintiffs for work done, and gave them a document in payment, which was drawn on the Union Bank of London, Ltd., and then proceeded in these terms, "Pay to J. Bavins, Junr., and Sims, the sum of sixty-nine pounds 7s. Provided the receipt form at foot hereof is duly signed, stamped and dated—£69 7s." It was duly signed on behalf of the railway company and was crossed generally, and there was a form of receipt at the foot.

This document was stolen from the plaintiffs, the receipt then being unsigned. Later it was paid into the defendants' bank for collection on behalf of a customer and was credited to the customer's account, and the defendants then presented it in the ordinary way to the Union Bank, who paid the amount.

The indorsement of the document, and the signature of the form of receipt at the foot, were not made by the plaintiffs, nor by their authority, and there was no direct evidence who made them. The indorsement was not very legible, but appeared to be in the name of J. Bavins, Trench & Sims, and not that of the plaintiffs. It did not appear that the customer of the defendants knew the document had been stolen.

The plaintiffs sued the defendant Bank to recover the money from them as damages for conversion and alternatively as money had and received, and the case was tried before KENNEDY, J. The defendants contended that the document was a crossed cheque and that they had merely collected it for a customer, in good faith and without negligence, and were therefore protected by section 82 of the Bills of Exchange Act, 1882. But KENNEDY, J., held that the document was not a cheque within the meaning of the Bills of Exchange Act, because, the amount being only payable on condition the receipt was signed, it was not an unconditional order within the definition of a bill of exchange under section 3 of the Act, and therefore could not be a cheque within the definition in section 73, and so section 82 did not

apply, and he gave judgment for the plaintiffs. The defendants now appealed, and before the Court of Appeal they also contended that by section 17 of the Revenue Act, 1883, the provisions of section 82 of the Bills of Exchange Act were extended to other documents.

Decision

The **Court of Appeal** held that the defendants had been negligent, and therefore were not protected by either of those enactments; and they also affirmed the decision of **KENNEDY, J.**, that the document was not a cheque, and held that the plaintiffs were entitled to recover the amount claimed from the defendants for money had and received.

In the course of his judgment, **A. L. SMITH, L.J.**, said:—

“In my opinion **KENNEDY, J.**, was quite right in holding that this order was not a cheque within the definition given by the Bills of Exchange Act, 1882, section 73, because it was not an unconditional order in writing for the payment of money within section 3, sub-section 1, of that Act. . . . We all agree that . . . the count for money had and received can be sustained and the amount received by the defendants can be recovered by the plaintiffs under it.”

NOTES

In *Nathan v. Ogdens Ltd.* (1905), 93 L. T. 553; (1906), 94 L. T. 126, a cheque had printed at the foot these words: “The receipt at the back hereof must be signed, which signature will be taken as an indorsement of the cheque,” and on the back was a form of receipt. It was held that the words in question were not addressed to the drawees (that is, the Bank upon whom the cheque was drawn), but to the payees, and therefore the order to pay was unconditional and the document was a cheque. This decision was quoted with approval in the case of *Roberts & Co. v. Marsh*, [1915] 1 K. B. 42.

THE PAYEE

(1) **BANK OF ENGLAND v. VAGLIANO BROS.,**

[1891] A. C. 107

(2) **NORTH AND SOUTH WALES BANK, LTD.**

v. MACBETH,

[1908] A. C. 137

The meaning of a “fictitious or non-existing person” under s. 7, sub-s. 3, of the Bills of Exchange Act, 1882.

Facts of the First Case

Vagliano carried on business in London as a merchant and foreign banker in the name of Vagliano Brothers. His bankers were the Bank of England. He had a large number of correspondents in various parts of the world, who were in the habit of drawing bills upon him. When doing so they advised him by letter of the bills drawn upon him, and particulars of the bills were entered from these letters into a "bills payable" book by one of Vagliano's clerks. The bills were usually sent to London agents of the payees, and then brought to Vagliano's office for acceptance. Each month Vagliano advised the Bank of the bills falling due for payment during the month.

One of Vagliano's correspondents was Vucina, a merchant and banker in Odessa, who had done business with him for 29 years. He often drew large bills on Vagliano, and some were drawn in favour of a firm, Petridi & Co.

Among the clerks employed by Vagliano at his office in London, was one Glyka, who with another clerk managed the foreign correspondence, and Glyka was well acquainted with the routine followed with reference to bills, and he had no difficulty in getting possession of genuine letters of advice from Vucina, and genuine bills drawn by him. From time to time Glyka then forged Vucina's signature as drawer of bills on Vagliano to the extent of £71,500, and in each case he wrote in the name of Petridi & Co. as payees. The persons described in the bills as drawer and payee were accordingly neither genuine drawer nor genuine payee in this transaction, although they were, of course, existing persons. He also forged letters of advice from Vucina in respect of the bills, and from these letters the usual particulars were entered in the "bills payable" book by the clerk who was responsible for that duty. Glyka then followed the usual routine for getting the bills accepted, and they were duly accepted by Vagliano, and the Bank were advised at the beginning of each month, as usual, that they would become payable.

Glyka got possession of the bills again after acceptance by Vagliano, and then forged the indorsements of the payees, Petridi & Co., and by such indorsements made the bills payable to "B. Maratis" or "N. Maratis," who were non-existing persons, and then cashed the bills at the Bank of England, sometimes himself, and sometimes by another person. He was later arrested, admitted the forgeries, and received ten years' penal servitude.

The Bank had debited Vagliano's account with the amounts paid on these bills, and Vagliano now claimed that the Bank

must recredit him with such amounts, and so the question arose whether Vagliano or the Bank must bear the loss. The Bank contended (*inter alia*) that as the drawer's signatures of the bills were forged in each case, the bills were, under the circumstances, payable to fictitious or non-existing persons within the meaning of section 7, sub-section 3, of the Bills of Exchange Act, 1882, and were therefore payable to bearer.

That sub-section provides as follows :—

“Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer.”

Decision in the First Case

On appeal, the **House of Lords** held (on this point) that the payees named in the bills were fictitious or non-existing persons within the meaning of the above provision, and therefore the bills were payable to bearer, and the Bank were entitled to charge Vagliano with the amounts paid by them on the bills, and were not bound to bear the loss themselves.

Dealing with this point, Lord MACNAGHTEN said :—

“On behalf of Vagliano Brothers it was contended that a bill payable to a fictitious person is not payable to bearer unless the acceptor is proved to have been aware of the fiction; and further, it was contended that nothing but a creature of the imagination can properly be described as a fictitious person. I do not think that either of these contentions . . . can be maintained. . . . Then it was said that the proper meaning of 'fictitious' is 'imaginary.' I do not think so. I think the proper meaning of the word is 'feigned' or 'counterfeit.' It seems to me that the C. Petridi & Co. named as payees on these pretended bills were, strictly speaking, fictitious persons. When the bills came before Vagliano for acceptance they were fictitious from beginning to end. The drawer was fictitious; the payee was fictitious; the person indicated as agent for presentation was fictitious. One and all they were feigned or counterfeit persons put forward as real persons, each in a several and distinct capacity; whereas, in truth, they were mere make-believes for the persons whose names appeared on the instrument. They were not, I think, the less fictitious because there were in existence real persons for whom these names were intended to pass muster.”

Facts of the Second Case

Macbeth was induced by the fraud of White to draw a cheque for £11,250 in favour of Kerr or order. K. was an existing person, and Macbeth intended that K. or his transferee should receive the money, though induced to do so by W.'s fraud. W.

obtained the cheque himself, forged K.'s indorsement, and paid the cheque into his own account at the N. and S. Wales Bank, and they presented it in due course to Macbeth's Bank and received payment.

On discovering the fraud, Macbeth sued the N. and S. Wales Bank to recover the money from them, and as K.'s indorsement had been forged on the cheque, the Bank did not dispute that they were liable to Macbeth, unless they could show that the payee K. was a "fictitious" person under the above section 7, sub-section 3, but they did contend that K. was a fictitious person in the circumstances, and they relied on the case of the *Bank of England v. Vagliano Brothers*.

Decision in the Second Case

On appeal, it was held by the **House of Lords** that the sub-section did not apply, and that the case was not covered by the decision in Vagliano's case, because in the present instance the drawer of the cheque (Macbeth) did intend the payee K., or his transferee, to have the money, and therefore K. could not be regarded as a fictitious person, and so the Bank were liable to Macbeth.

Lord LOREBURN, L.C., said, at p. 139:—

"I adopt the language of BRAY, J.: 'It seems to me that when there is a real drawer who has designated an existing person as the payee, and intends that that person should be the payee, it is impossible that the payee can be fictitious.' If the argument for the appellants were to prevail, namely, that the payee was a fictitious person because White (who was himself no party to the cheque) did not intend the payee to receive the proceeds of the cheque, most serious consequences would follow. It would follow, as it seems to me, that every cheque to order might be treated as a cheque to bearer if the drawer had been deceived, no matter by whom, into drawing it. To state such a proposition is to refute it. . . . As to the authorities, I agree with the Court of Appeal in thinking that neither *Bank of England v. Vagliano*, nor *Clutton v. Attenborough*, [1897] A. C. 90, governs the present case. I will not discuss the former of those authorities beyond saying that it was not a case in which the drawer intended the payee to receive the proceeds of the bill, and in the latter authority the payee was a non-existent person whom no one either could or did mean to be the recipient of the proceeds of the cheque."

NOTES

In the case of *Clutton v. Attenborough*, [1897] A. C. 90, Clutton drew cheques in favour of Brett under fraudulent misrepresentations

by his clerk that money was due from him to B. In fact there was no such person as B. When C. had signed the cheques, his clerk then forged indorsements purporting to be made by B. and got Attenborough to cash the cheques for him. A. acted in good faith and had no notice of the fraud. A. then presented the cheques at C.'s bank and received payment. C. sued A. to recover the amount of the cheques so received by A., but it was held that he could not recover, because B. was a "non-existing" person under the above section 7, sub-section 3, and therefore the cheques were payable to bearer, and accordingly A. was entitled to keep the money received from C.'s bank.

It should be observed that in the cases of *North and South Wales Bank v. Macbeth*, and *Clutton v. Attenborough* neither Macbeth, nor Clutton, could recover the money in question from his own bank, upon which the respective cheques were drawn, because section 60 of the Bills of Exchange Act, 1882, protects a bank from liability, where the bank has paid cheques drawn on itself and payable to order, in respect of which there have been forged indorsements, provided the bank has acted in good faith and in the ordinary course of business.

On the other hand, there is no such protection for the acceptor of a bill of exchange who pays the wrong person on a forged indorsement of a bill of exchange payable to order, nor for a bank which pays the wrong person on a forged indorsement of a bill of exchange payable to order which has been accepted by its customer and made payable by him at the bank. See *Robarts v. Tucker* (1851), 16 Q. B. 560. And in such cases, the acceptor, or the bank, as the case may be, is still liable to pay the right person. This is not affected by the Bills of Exchange Act, for section 60 applies only to a bank, and only where a bank pays a cheque payable to order drawn on itself. See also section 24 of the Act. (See Stevens' Elements of Mercantile Law, 10th Edn., pp. 370 *et seq.*)

FRAUDULENT ALTERATIONS

(1) **SCHOLFIELD v. EARL OF LONDESBOROUGH,**
[1896] A. C. 514

(2) **LONDON JOINT STOCK BANK, LTD. v.
MACMILLAN AND ARTHUR,**
[1918] A. C. 777

The acceptor of a bill of exchange is under no duty to take precautions against fraudulent alteration of the bill after acceptance; but in the case of a cheque, the

customer of a bank when drawing a cheque owes a duty to the bank to take reasonable precautions against possible alteration of the cheque.

Facts of the First Case

One, Sanders, drew a bill of exchange on the defendant for £500, payable three months after date to the drawer or order. It bore a £2 stamp which was sufficient to cover a sum of £4,000. The defendant accepted the bill as drawn.

After such acceptance, Sanders fraudulently increased the amount of the bill to £3,500, by inserting the figure "3" between the letter "£" and the figures "500," and by writing in the word "three" at the end of one line and the word "thousand" at the beginning of the next line, in front of the words "five hundred" in the body of the bill. It appeared that the necessary spaces to allow those words to be inserted had been left by Sanders when drawing the bill.

After altering the bill, Sanders indorsed the bill to Scott, and the plaintiff (Scholfield) took the bill from Scott in good faith and for value.

The plaintiff sued the defendant to recover the amount of the bill, as altered, £3,500. The defendant paid into court £500, the amount of the bill as accepted by him, and denied any further liability. The plaintiff contended (*inter alia*) that the defendant was negligent in accepting the bill in that form for £500, and with a stamp for £2 upon it.

Decision in the First Case

On appeal the **House of Lords** held that the plaintiff's action failed. The acceptor of a bill was under no duty to take precautions against a subsequent alteration of the bill, and the allegation of negligence against the defendant accordingly failed.

In the course of his judgment, Lord WATSON said, at p. 537 :—

" The duty of the customer arises directly out of the contractual relation existing at the time between him and the banker, who is his mandatory. There is no such connection between the drawer or acceptor and possible future endorsees of a bill of exchange. The duty which the appellant's argument assigns to an acceptor is towards the public, or what is much the same thing, towards those members of the public who may happen to acquire right to the bill, after it has been criminally tampered with. Apart from authority, I do not think the imposition of such a duty can be justified on any sound legal principle. In many, if not most, cases which occur in the course of business,

the bill is written out by the drawer, and sent by him to the acceptor, who is under an obligation to sign it. Assuming the appellant's argument to be well founded, it would be within the right of the acceptor to return the bill unsigned, if it were not drawn so as to exclude all reasonable possibilities of fraud or forgery. The exercise of that right might lead to very serious complications in commercial transactions. Besides, it is not consistent with the general spirit of the law to hold innocent persons responsible for not taking measures to prevent the commission of a crime which they may have no reason to anticipate: although there may be an exception in the case where one of the parties to the instrument has, either by express agreement or by implication established in the law, become bound to use such precautions. I am therefore unwilling in the case of an acceptor to affirm the doctrine upon which the appellant relies, unless it can be shown to be established by authority as part of the English law merchant. But the result of the English authorities is, in my opinion, decidedly adverse to the appellant."

Facts of the Second Case

A firm, Macmillan & Arthur, were customers of the London Joint Stock Bank, and entrusted to a confidential clerk the duty of filling in cheques for signature. This clerk presented a cheque to one of the partners for signature, drawn in favour of the firm or bearer. There was no sum written in words on the cheque, but in the space provided for figures were the figures "2. 0. 0."

The partner signed the cheque, and the clerk then added the words "one hundred and twenty pounds" in writing, and inserted the figures "1" and "0" respectively on each side of the figure "2" which had been so placed as to leave room for this to be done. He then presented the cheque at the Bank and received £120, and the Bank debited the firm's account with that sum.

The firm contended that the Bank could only debit them with £2, and brought this action for a declaration to that effect. The Bank alleged that the firm had been negligent in the drawing and signing of the cheque.

Decision in the Second Case

The **House of Lords** held that the relation of banker and customer imposed a special duty on the customer, in drawing a cheque, to take reasonable and ordinary precautions against forgery, and that the alteration by the clerk in this case was the direct result of a breach of that duty by the firm, and therefore the Bank were entitled to debit the firm with the full amount of £120 paid by them on the cheque.

In his judgment, Lord FINLAY, L.C., said, at p. 789:—

"A cheque drawn by a customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque. It is beyond dispute that the customer is bound to exercise reasonable care in drawing the cheque to prevent the banker being misled. If he draws the cheque in a manner which facilitates fraud, he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty . . . As the customer and the banker are under a contractual relation in this matter, it appears obvious that in drawing a cheque the customer is bound to take usual and reasonable precautions to prevent forgery. If the cheque is drawn in such a way as to facilitate or almost to invite an increase in the amount by forgery if the cheque should get into the hands of a dishonest person, forgery is not a remote but a very natural consequence of negligence of this description."

NOTES

Under s. 24 of the Forgery Act, 1913, a forged or unauthorised signature is wholly inoperative. See as to this and the exceptions, Stevens' Elements of Mercantile Law, 10th Edn., p. 396.

In *Young v. Grote* (1827), 4 Bing. 253, Young, who was going away on business, handed to his wife five cheques already signed by himself, but with blanks left for the amounts, so that his wife could fill them up as required for the purposes of his business. She required £50 2s. 3d. to pay wages, and got one of her husband's clerks to fill in one of the cheques for this sum. He made it out "Pay wages or bearer," and wrote in the amount as follows: "fifty pounds 2s. 3d." the word "fifty" commencing in the middle of the line and with a small letter, and he put the amount also in figures but so that the figure "50" was some distance from the printed letter "£." The wife saw the cheque when so filled up, and handed it to the clerk to cash it. He then altered the amount of the cheque to £350 2s. 3d. by writing in the words "three hundred and" before the word "fifty" and inserting the figure "3" between the letter "£" and the figure "5." The bank cashed the cheque for £350 2s. 3d., and it was held the loss must fall on the customer, Young.

In *Slingsby v. District Bank, Ltd.*, [1932] 1 K. B. 544, the plaintiffs were executors of an estate and had a bank account with the defendants. They employed a firm, C. & P., as solicitors. On the instructions of the plaintiffs, C. filled up a cheque in favour of J. P. & Co., and the plaintiffs signed it. Between the name of the payees (J. P. & Co.) and the printed words, "or order," there was a blank space, and C. afterwards altered the cheque by adding the words "per C. & P." after the payees' name. He then indorsed the

cheque in his firm-name, "C. & P.," and paid it into the bank account of a company in which he was interested, and the bank collected the amount of the cheque from the defendants. It was held that the cheque had been altered by forgery in a material particular, that the plaintiffs were not guilty of any negligence in the signing of the cheque, and that the defendants could not debit the plaintiffs with the amount paid on the cheque.

And in the case of *Hall v. Fuller* (1826), 5 B. & C. 750, where a cheque was properly drawn for £3 in writing and figures, but subsequently it was fraudulently altered by a holder, who erased that amount, and inserted the sum of £200, and the bank paid £200 on the cheque, it was held that the bank could only debit their customer with the sum of £3.

And although a customer owes a duty to his bank to exercise reasonable care in drawing cheques, there is no duty on the customer to exercise precautions in the general way of carrying on his business, and so in *Kepitigalla Rubber Estates, Ltd., v. National Bank of India*, [1909] 2 K. B. 1010, where the secretary of a company over a period of two months drew cheques by forging two signatures of the directors, and it appeared that during this period the company had not examined their bank pass-book, nor the company's cash-book, it was held that that did not make the company liable, and the bank could not charge the company with the amounts paid by them on those forged cheques.

COLLECTION OF CHEQUES

(1) **A. L. UNDERWOOD, LTD. v. BANK OF LIVERPOOL AND MARTINS**

(2) **A. L. UNDERWOOD, LTD. v. BARCLAYS BANK,**
[1924] 1 K. B. 775

- (a) *Where a director of a company pays into his private account cheques drawn in favour of the company, the bank receiving the cheques for collection must make reasonable inquiries as to the director's right to deal with the cheques in that way.*
- (b) *When a customer pays a cheque into his bank account for collection, the mere fact that the bank credits him with the amount of the cheque before it is cleared does not make the bank holders for value, unless the bank has so acted in pursuance of an agreement that the*

customer should be allowed to draw against cheques before clearance.

Facts of the First Case

Underwood was a merchant and had a bank account with the defendants, and also one with King & Co., the latter account being overdrawn. In July, 1919, he turned his business into a limited company called A. L. Underwood Ltd., with a capital of £12,000. The subscribers to the Memorandum of Association were U. and another, for one share each, and U. was appointed sole director. 10,000 fully paid shares were allotted to U. as the consideration for the sale of his business to the company. No other shares were allotted (except the two for which the memorandum was subscribed), and the one belonging to the other person was later transferred to U.'s wife. A debenture charging the company's assets was issued to K. & Co. as security for their overdraft.

The company's bank account was kept with K. & Co., but U. continued his private account with the defendants. In fraud of the company, U. paid a number of cheques which were drawn in favour of the company, into his private account at the defendants' bank, all of them being indorsed by U. as follows:—“A. L. U., Ltd., A. L. U. Sole Director.” U. had authority to indorse cheques in that way, but not of course to pay these cheques into his private account.

When collecting the cheques and crediting U. with the proceeds, the defendants did not inquire whether the company had a separate banking account, or make any other inquiry as to U.'s right so to deal with the cheques, and the company now sued the defendants for conversion of the cheques. In their defence the defendants alleged that U., as sole director, had authority to pay the cheques into his own account, and that there was nothing to put the defendants on inquiry. And as to such of the cheques as were crossed they also pleaded section 82 of the Bills of Exchange Act, 1882. ROCHE, J., held that U. had no authority to pay the cheques into his own account, and that the defendants were guilty of negligence in not inquiring whether the company had a separate banking account, and if so why these cheques were not paid into that account, and that for this reason they were also precluded from relying upon section 82, and he gave judgment for the company. The defendant appealed.

Decision in the First Case

The Court of Appeal upheld the decision of ROCHE, J., and dismissed the appeal.

In his judgment, SCRUTTON, L.J., said, at p. 791:—

“ Unless, therefore, the defendant bank can show some excuse in law, they are guilty of conversion. Their first line of defence was that as Underwood was acting within his apparent authority, the fact that he was using that authority for his own benefit was immaterial . . . But in the present case, Underwood in asking the bank to collect and pay the proceeds into his private account was not purporting in this transaction to act as agent for his company, or to create privity between them and the bank; he was acting and purporting to act for himself as principal. . . . This line of defence, in my opinion, fails.”

“ The next line of defence was under section 82 of the Bills of Exchange Act, which protects bankers who, in good faith and without negligence, collect crossed cheques for a customer who has no title to them. . . . It is not disputed that the defendant bank acted in good faith, but it is said, and the judge has found, that they acted negligently, because they received for collection on behalf of a servant of a company, for his personal account, cheques made payable to the company. . . . The defendant bank did not know there were no independent shareholders, and there was in fact an independent debenture-holder whose interests would be affected; and inquiries of Mr. Underwood himself, as to whether the company had its own banking account, might easily have had considerable effect. If banks for fear of offending their customers will not make inquiries into unusual circumstances, they must take, with the benefit of not annoying their customers, the risk of liability because they will not inquire. I agree with ROCHE, J.’s, view, that the bank were guilty of negligence.”

Facts of the Second Case

In this case the facts were substantially the same as in the first case, the only substantial distinction being that the defendants’ main contention in respect of the company’s cheques which Underwood had paid into his private account at the defendants’ bank, was that the defendants took such cheques as holders in due course. In support of that defence the defendants proved that immediately upon the cheques being paid in they credited U. with the amounts, but there was no agreement with U. that he should be allowed to draw against the cheques before they were cleared, nor did he do so in fact, and on some of the paying-in slips there was a note that the bank reserved the right to postpone payment of cheques drawn against uncleared effects which might have been credited to an account. The defendants also set up the same defences as the defendants

in the first case. ROCHE, J., gave judgment for the plaintiffs, and the defendants appealed.

Decision in the Second Case

The Court of Appeal dismissed the appeal, and in his judgment, ATKIN, L.J., dealing with the defence that the defendants were holders in due course, said :—

" I think it sufficient to say that the mere fact that the bank, in their books, enter the value of the cheques on the credit side of the account on the day on which they receive the cheques for collection does not, without more, constitute the bank a holder for value. To constitute value there must be in such a case a contract between banker and customer, express or implied, that the bank will, before receipt of the proceeds, honour cheques of the customer drawn against the cheques. Such a contract can be established by course of business and may be established by entry in the customer's pass-book, communicated to the customer and acted upon by him. Here there is no evidence of any such contract."

NOTES

In the case of *Lloyds Bank Ltd. v. Chartered Bank of India*, [1929] 1 K. B. 40, the plaintiffs' chief accountant at Bombay had authority to draw cheques on other bankers with whom the plaintiffs had an account. He himself had a private account with the defendants, and another account at the plaintiffs' branch at Bombay, and his salary was paid by the plaintiffs into the latter account. He fraudulently drew cheques on the plaintiffs' bank in favour of the defendants, and then sent the defendants written instructions to credit his own account with the moneys, and drew various sums out, chiefly for his own purposes. It was held that the defendants were liable to repay the amounts of the cheques to the plaintiffs, and could not claim protection under the section of the Indian Negotiable Instruments Act, which corresponded to section 82 of the Bills of Exchange Act, because they ought to have made inquiries before putting the cheques to the accountant's private account, and they had been guilty of negligence.

The case of *Ross v. London County Westminster and Parrs Bank*, [1919] 1 K. B. 678, was another instance in which a bank was held guilty of negligence in collecting cheques made payable to an official, on behalf of a private customer, without making proper inquiries.

The Courts have shown a tendency to extend the scope of inquiries which a banker should make if he wishes to clear himself of the charge of negligence and enjoy the protection of s. 82. In this respect much the most important case is *Lloyds Bank v. Savory &*

Co., [1933] A. C. 201. There a clerk of Savory & Co. had an account with a branch of Lloyd's Bank, and the wife of another clerk banked with another branch. Both clerks stole crossed bearer cheques from their employers and paid them in at the head office of Lloyds Bank for the credit of the accounts at the branches. It was held that Lloyds Bank were liable to refund the money. They could not bring themselves within the protection of s. 82, since they had acted negligently in not obtaining the names of the clerk's employers or of the employers of the customer's husband at the opening of the account.

While the limits of the necessary requirements have not been reached, since still more far-reaching measures may have to be taken in course of time (Charley, *Law of Banking*, p. 124), it would seem that on the opening of an account a bank must now not only take up the references but must also make inquiries as to the occupation of the would-be customer. In the event of its appearing that he is an employee, or if a married woman, that her husband is an employee, the name of the employer should be ascertained. The word "employee" here includes not only clerks and servants, but also agents and officials of corporations such as company directors (*Underwood v. Bank of Liverpool, supra*). Similar inquiries would seem to be called for where the customer is a member of a partnership, for the dishonest partner represents just as great a danger to the firm as the dishonest employee. While the bank's main duty of inquiry is at the opening of the account it may also be expedient to scrutinise a customer's account from time to time. (See *dictum* by Sankey, L.J., in *Lloyds Bank v. Chartered Bank of India, supra*.)

The banker's duty may be negatived by the true owner's conduct. Thus, in *Morison v. London County & Westminster Bank*, [1914] 3 K. B. 356, the bank was not liable for cheques collected for a fraudulent clerk and belonging to the plaintiff, because the latter had made no representations to the bank though the frauds extended over a considerable period.

The case of *Capital and Counties Bank Ltd. v. Gordon*, [1903] A. C. 240, decided that section 82 of the Bills of Exchange Act only protected a collecting banker when the cheques paid in for collection were crossed before they were received by the banker. The case also decided that when a banker credited a customer with the amount of a cheque so paid in and allowed him to draw against it, before it had been put through the clearing house, and paid, then the banker was not protected by section 82, because in those circumstances he was not then collecting the cheque for the customer within the meaning of the section, for having in effect advanced the money to the customer he had himself become the holder. In consequence of this latter decision the Bills of Exchange (Crossed Cheques) Act, 1906, provided as follows :

"A banker receives payment of a crossed cheque for a customer within the meaning of section 82 of the Bills of

Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof."

It will be seen, however, from the above decision in the cases of *Underwood Ltd.*, that the mere fact that a banker does credit a customer's account with the amount of a cheque before it is cleared does not make the banker a holder for value, unless he has done that in pursuance of an agreement to allow the customer to draw against cheques paid in before they are cleared.

BANKER AND CUSTOMER

N. JOACHIMSON *v.* SWISS BANK CORPORATION, [1921] 3 K. B. 110

The relationship of banker and customer is primarily that of debtor and creditor, but where a customer has money standing to his credit on current account at a bank, then, in the absence of any special agreement, a demand by the customer is necessary before he is entitled to bring an action against the bank for the money.

Facts of the Case

The plaintiff firm carried on business in Manchester. There were three partners in the firm, S. J. and J. J. (who were German subjects), and M., a naturalised British subject. On August 1st, 1914, S. J. died and the partnership was thereby dissolved. On the outbreak of war on August 4th, 1914, J. J. became an alien enemy.

The firm had a banking account with the defendants, and on August 1st, 1914, £2,321 was standing to their credit at such account. No money was paid out of the account after that date.

On June 5th, 1919, M. commenced an action in the firm name, to recover the said sum of £2,321 for the purpose of winding up the partnership affairs, the cause of action being alleged to have arisen on or before August 1st, 1914.

The firm had not made any demand on or before that date for payment of the sum in question, and the defendants pleaded (*inter alia*) that by reason thereof no cause of action had accrued to the firm on August 1st, 1914, and, therefore, the action was not maintainable.

Decision

On appeal, the **Court of Appeal** held, that where money was standing to the credit of a customer on current account at a bank, a previous demand was necessary before an action could be maintained against the bank for the money, and the Court therefore entered judgment for the defendants.

In his judgment, **ATKIN, L.J.**, said:—

“ I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear, upon consideration, to include the following provisions. The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer, addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept.”

NOTES

In the ordinary case of a debt, it is the duty of the debtor to seek out the creditor and pay him, and no demand for payment by the creditor is necessary before he brings an action against the debtor. But as will be seen from the above case, this does not apply as between a bank and its customer as regards money standing to the credit of the customer on a current account.

An important consequence of this is that the Statute of Limitations will not run in favour of a bank, and against the customer, until a demand for repayment has been made by the customer and not complied with.

TOURNIER v. NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND,

[1924] 1 K. B. 461

It is an implied term of the contract between a bank and its customer that the bank enters into a qualified obligation to abstain from disclosing information as to his affairs without his consent.

Facts of the Case

The plaintiff was a customer of the defendant bank, and his account was overdrawn by £9 8s. 6d. In April, 1922, he arranged to pay this off at £1 per week but ceased after paying three instalments.

In June, 1922, he entered the service of K. & Co. under an agreement for three months' employment as traveller and salesman. Shortly afterwards he received a cheque for £45 from a company who were also customers at the same branch of the defendant bank. He did not pay the cheque into his account but indorsed it to someone else who had an account at the L. C. & M. Bank, and that bank collected it from the defendant bank.

The defendants' manager then inquired of the L. C. & M. Bank who their customer was for whom they had collected payment of the cheque and was told the customer was a bookmaker. The manager then rang up K. & Co. and asked for the plaintiff's private address and told them he was indebted to the defendants and had not replied to several letters. In consequence of that communication, K. & Co. refused to renew the plaintiff's employment when the three months expired.

The plaintiff sued the defendants for slander, and also for breach of an implied contract that they would not disclose to third persons the state of his account or any transactions relating thereto. The case was tried by AVORY, J., and a jury, and judgment entered for the defendants. The plaintiff now appealed.

Decision

The **Court of Appeal** allowed the appeal and ordered a new trial.

In the course of his judgment, ATKIN, L.J., said:—

“ I come to the conclusion that one of the implied terms of the contract is that the bank enter into a qualified obligation with their customer to abstain from disclosing information as to

his affairs without his consent. . . . The first question is: To what information does the obligation of secrecy extend? It clearly goes beyond the state of the account, that is, whether there is a debit or a credit balance, and the amount of the balance. It must extend at least to all the transactions that go through the account, and to the securities, if any, given in respect of the account; and in respect of such matters it must, I think, extend beyond the period when the account is closed, or ceases to be an active account. . . . I further think that the obligation extends to information obtained from other sources than the customer's actual account, if the occasion upon which the information was obtained arose out of the banking relations of the bank and its customers—for example, with a view to assisting the bank in conducting the customer's business, or in coming to decisions as to its treatment of its customers. . . . In this case, however, I should not extend the obligation to information, as to the customer, obtained after he had ceased to be a customer. . . . On the other hand, it seems to me clear that there must be important limitations upon the obligation of the bank not to divulge such information as I have mentioned. It is plain that there is no privilege from disclosure enforced in the course of legal proceedings. . . . It is difficult to hit upon a formula which will define the maximum of the obligation which must necessarily be implied. But I think it is safe to say that the obligation not to disclose information such as I have mentioned is subject to the qualification that the bank have the right to disclose such information when and to the extent to which it is reasonably necessary for the protection of the bank's interests, either as against their customer or as against third parties in respect of transactions of the bank for or with their customer, or for protecting the bank, or persons interested, or the public, against fraud or crime. I have already stated the obligation as an obligation not to disclose without the customer's consent. It is an implied term, and may, therefore, be varied by express agreement. . . . A common example of such consent would be where a customer gives a banker's reference. The extent to which he authorises information to be given on such a reference must be a question to be determined on the facts of each case. I do not desire to express any final opinion on the practice of bankers to give one another information as to the affairs of their respective customers, except to say it appears to me that if it is justified it must be upon the basis of an implied consent of the customer."

NOTES

In the case of *Batts Combe Quarry Co. v. Barclays Bank, Ltd.* (1931), 48 T. L. R. 4, it was decided by AVORY, J., that where an inquiry is made of a bank as to the stability of a customer, the

only duty, if any, which the bank owes to the person making the inquiry, in giving a reply to the inquiry, is a duty not to be negligent, and unless the inquirer can show that the bank did act negligently in replying, he will have no claim against the bank, even though the information should prove to be inaccurate.

The *Tournier Case* shows that although the relation of banker and customer is primarily based on a contract of loan as shown in *Joachimson's Case (supra)* the banker in handling his customer's transactions comes in many respects under the obligations of an agent. His position in regard to the collection of cheques for his customer which we have already examined is another example of this.

INSURANCE

THE PRINCIPLES OF INSURANCE LAW

(1) **CASTELLAIN v. PRESTON**

(1883), 11 Q. B. D. 380

(2) **DALBY v. THE INDIA AND LONDON LIFE ASSURANCE CO.**

(1854), 15 C. B. 365

(a) *A contract of insurance is a contract of indemnity except in the case of life assurance.*

(b) *The doctrine of subrogation.*

Facts of the First Case

The defendants owned certain premises in Liverpool, and in March, 1878, they effected an insurance on the buildings against loss by fire with an insurance company. The policy was in the usual form giving the insurers the option of reinstating the property.

In July, 1878, the defendants agreed to sell the premises for £3,100, and received a deposit. The contract was to be completed on a day within two years to be named by the defendants. In August a fire occurred which damaged part of the buildings, and the claim was agreed at £330. The insurers paid that sum to the defendants in ignorance of the contract made for the sale of the property.

The contract for sale was eventually completed in December, 1879, and the balance of the purchase money was then paid to the defendants by the purchasers.

The insurance company claimed to be repaid by the defendants the sum of £330 paid by them, on the ground that a contract of insurance against fire was a contract of indemnity and that in the circumstances the defendants had not lost anything in fact, because the contract for sale of the property had been duly completed, and the defendants had suffered no loss by the fire; and the company also claimed to be subrogated to the rights of the defendants, under that contract for sale, to the extent of the sum of £330. CHITTY, J., gave judgment for the defendants, and the insurance company now appealed.

Decision in the First Case

It was held by the **Court of Appeal** that the insurance company's contentions were correct, and they were entitled to judgment for £330.

BRETT, L.J., said:—

“The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified.”

And later, speaking of the doctrine of subrogation, he said:—

“That doctrine does not arise upon any of the terms of the contract of insurance; it is only another proposition which has been adopted for the purpose of carrying out the fundamental rule which I have mentioned, and it is a doctrine in favour of the underwriters or insurers in order to prevent the assured from recovering more than a full indemnity; it has been adopted solely for that reason. . . . Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavour to express, namely, that as between the underwriter and the assured, the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the

name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished."

Facts of the Second Case

In 1843 an assurance company granted to Wright four policies of insurance on the life of the Duke of Cambridge, for £3,000 in all. The company wished to indemnify themselves, to the extent of £1,000, against their liability under these policies, and accordingly the plaintiff, on behalf of the company, took out a policy with the defendants for £1,000 on the life of the Duke in 1847. In 1848, in consideration of the surrender by W. of his four policies, and the payment by him of £325, the company granted certain annuities to W. and his wife for their lives, and the said four policies were delivered up by W. and cancelled by the company, so that the company no longer had any interest in the life of the Duke, but the policy for £1,000 taken out by the plaintiff with the defendants was still kept up and shortly afterwards was transferred to Curteis, and then the premiums on that policy were paid by the plaintiff on behalf of C.

The Duke of Cambridge died on the 8th July, 1850, and the plaintiff claimed the sum of £1,000 on the policy, but the defendants contended (*inter alia*) that the plaintiff could not recover because the insurable interest in respect of which the policy was taken out in 1847 ceased when W. surrendered his policies in 1848, and that the plaintiff therefore had not a sufficient insurable interest under the Life Assurance Act, 1774. CRESWELL, J., ruled that that was so, and the plaintiff appealed.

Decision in the Second Case

It was held by the **Court of Exchequer Chamber** that life assurance was not a contract of indemnity, and that it was only necessary that the assured should have an insurable interest at the date of taking out the policy, and a continuance of insurable interest down to the date of the death was not essential, and as in this case the company on whose behalf the plaintiff effected the policy had an insurable interest, at the date when the policy was taken out, to the full extent of the amount assured, £1,000, the plaintiff's claim succeeded.

In delivering the judgment of the Court, PARKE, B., said, at p 387:—

"The contract commonly called life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life—the amount of the annuity being

calculated, in the first instance, according to the probable duration of the life ; and, when once fixed, it is constant and invariable" (meaning the premium). ". . . This species of insurance in no way resembles a contract of indemnity. . . . As the company had unquestionably an interest in the continuance of the life of the Duke of Cambridge—and that to the amount of £1,000, because they had bound themselves to pay a sum of £1,000 to Mr. W. on that event—the policy effected by them with the defendants was certainly legal and valid, and the plaintiff, without the slightest doubt, could have recovered the full amount, if there were no other provision in the Act" (that is the above Act of 1774). "The question arises on the third clause. It is as follows: 'And be it further enacted, that in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the assured in such life or lives, or other event or events.' . . . The defendants contend that the meaning of this clause is, that the assured shall recover no more than the value of the interest which he has at the time of the recovery, or receive more than its value at the time of the receipt. . . . But there is the most serious objection to any of these constructions. It is that the written contract, which, for the reasons given before, is not a wagering contract . . . is by this mode of construction completely altered in its terms and effect. It is no longer a contract to pay a certain sum as the value of a then-existing interest, in the event of death . . . but a contract to pay—contrary to its express words—a varying sum according to the alteration of the value of that interest at the time of the death or the accrual of the cause of action. . . . This seems to us so contrary to justice and fair dealing and common honesty, that this construction cannot, we think, be put upon this section. We should, therefore, have no hesitation, if the matter were *res integra*, in putting the much more reasonable construction on the statute, that, if there is an interest at the time of the policy, it is not a wagering policy, and that the true value of that interest may be recovered, in exact conformity with the words of the contract itself." The learned judge then discussed an earlier case which held that life insurance was a contract of indemnity and held that it should not be followed.

NOTES

In addition to life insurance personal accident and sickness insurance form an exception to the indemnity principle. Moreover, valued policies where the value of the subject-matter is agreed beforehand, are strictly speaking also an exception (as to these see Stevens' *Elements of Mercantile Law*, 10th Edn., p. 423).

The rule in *Castellain v. Preston* creates an unfairness. True, the

indemnity principle forbids the vendor of insured premises to keep the insurance payment and the full purchase price. But what happens in the *Castellain v. Preston* type of case is that the insurance company need pay no indemnity for a loss it covered, and for which it received premiums, and the loss instead falls on the purchaser. Section 47, Law of Property Act, 1925, sought to remedy this defect. It provides in effect that where the vendor of insured premises, lost or damaged between the contract for sale and their handing over to the new owner, receives the insurance money, he must, when transferring the property, pass on the money to the purchaser. The operation of this section is, however, doubtful; at any rate it can be varied by contract between vendor and purchaser and depends on the insurer's consent to the transfer. The surest protection for the purchaser of land is to insure it himself. Where the section applies it excludes subrogation; for the vendor holds the insurance payment in trust for the purchaser, and therefore receives no benefit to which the insurer could become entitled. Where for some reason s. 47 does not apply, the rule in *Castellain v. Preston* operates.

It is important to remember here that the right of subrogation only arises when the insurer has actually paid the loss. This was decided in *Page v. Scottish Insurance Corporation* (1929), 98 L. J. K. B. 308, where the insurers disputed part of the claim by the owner of a car for compensation in respect of damage negligently inflicted on it by a third person. When they in turn sued the wrongdoer the action was dismissed. Since the insurers had not actually paid the loss, but were disputing the assured's claim, they could not at the same time claim against the wrongdoer. SCRUTON, L.J. in explaining the position took the occasion to distinguish between subrogation and abandonment of the insured property:—

"On abandonment," he said at p. 311, "the property and all its incidents pass to the underwriter to whom it is abandoned; and it is quite possible . . . that underwriters have made an extremely good thing by accepting abandonment because they have got something more than the amount they have had to pay. On abandonment they acquire a title and they sue in their own name. Subrogation is quite a different thing. It is a kind of equitable right of underwriters who have indemnified the assured, seeking to minimise their loss by using for their own benefit any legal rights which the assured could have enforced in respect of the subject-matter insured. But in the case of subrogation the underwriter cannot sue in his own name. His rights are the rights of the assured. . . . But I have always understood that the underwriter had no right to subrogation unless and until he had fully indemnified the assured under the policy. When he had fully indemnified the assured he then had the equitable right to diminish his loss by using in his own favour and in the name of the assured any rights the assured

could use against a third party in respect of the subject-matter of the loss." See Stevens' Elements of Mercantile Law, 10th Edn., pp. 414, 450.

The case of *Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (1931), 48 T. L. R. 17, dealt with on page 245, should be referred to.

LONDON ASSURANCE v. MANSEL

(1879), 11 Ch. D. 363

In contracts of insurance the utmost good faith must be observed.

Facts of the Case

Defendant wished to insure his life, and at his solicitor's request the plaintiffs sent him forms of proposal.

The defendant filled up a proposal for the sum of £10,000 on his life. Two of the questions on the proposal form and the defendant's answers were :—

Questions.

"Has a proposal been made on your life at any other office or offices? If so, where?"

"Was it accepted at the ordinary premium, or at an increased premium, or declined?"

Answers.

"Insured now in two offices for £16,000 at ordinary rates. Policies effected last year."

At the foot of the proposal was a declaration, which the defendant signed, that the particulars given were true and that he agreed that the proposal and this declaration should be the basis of the contract.

The plaintiffs sent to the defendant's solicitor a written acceptance of the proposal; the defendant sent them a cheque for the first premium; and they sent him the usual certificate as to the assurance being effected.

Shortly afterwards the plaintiffs discovered that though the defendant was insured with one company for £10,000 and with another for £6,000 the latter company had decided not to increase the amount on an application by the defendant, and also that certain proposals made by the defendant to other companies (before the present proposal to the plaintiffs) for insurances on his life, had been declined. The plaintiffs, on discovering these

facts, refused to go on with the present proposal, and sent the defendant's solicitor a cheque for the first premium paid by the defendant. The defendant, however, returned the cheque.

The plaintiffs now brought this action, alleging that it was the duty of the defendant to inform them that his life had been refused by other offices, and claiming a declaration that the acceptance by them of his present proposal for insurance of £10,000 was void.

Decision

It was held by JESSEL, M.R., that the defendant was under a duty to disclose the above facts, and that accordingly the plaintiffs' acceptance of his proposal, and the contract for the assurance, were void.

In his judgment, JESSEL, M.R., said :—

" As regards the general principle I am not prepared to lay down the law as making any difference in substance between one contract of assurance and another. Whether it is life, or fire, or marine assurance, I take it good faith is required, in all cases, and, though there may be certain circumstances from the peculiar nature of marine insurance which require to be disclosed, and which do not apply to other contracts of insurance, that is rather, in my opinion, an illustration of the application of the principle than a distinction in principle. . . . In the case of *Dalgleish v. Jarvie* (1850), 2 Mac. & G. 231, 243, a case which had nothing to do with insurance, but which referred to the principles on which a special injunction ought to be granted *ex parte*, Lord CRANWORTH, then the Lord Commissioner ROLFE, says this : ' Upon one point it seems to me proper to add thus much, namely, that the application for a special injunction is very much governed by the same principles which govern insurance matters which are said to require the utmost degree of good faith, *uberrima fides*. In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of insurance, but all which in point of fact are so. If he conceals anything that he knows to be material, it is a fraud; but besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy.' "

NOTES

This duty of disclosure continues down to the time when the contract for insurance is concluded—see per CHANNELL, J., *In re*

arbitration between *Yager and Guardian Assurance Co.* (1912), 108 L. T. 38, at p. 44, where he said:—

"I think it is clearly settled that the law as to fire insurance and life assurance is the same as it is in reference to marine assurance, and that is that a policy is not binding if any material fact is not disclosed. . . . The time up to which it must be disclosed is the time when the contract is concluded. Any material fact that comes to his (the proposer's) knowledge before the contract he must disclose."

A fact is material if knowledge of it would have influenced a prudent insurer, either to refuse the risk altogether, or to accept it only at a higher premium.

The result is that if there is any material alteration in the risk between the date of the proposal and the date of the final acceptance of the risk by the insurance company (that is, the date of the concluding of the contract), that alteration must be disclosed to the company. Thus, in *Looker v. Law Union and Rock Insurance Co. Ltd.*, [1928] 1 K. B. 554, Looker made a proposal for insurance of his life. The company wrote him stating that the proposal was accepted, and that if his health remained unaffected the policy would be issued on payment of the first premium, and that the risk would not commence until then. Five days later L. became ill; two days later the illness was diagnosed as pneumonia, and four days later he died. No notice was given to the company of this illness, and the day before L.'s death the company received a cheque for the first premium, which had in fact been signed by L. three days earlier. The company then sent L. a certificate stating that his proposal had been accepted and a policy would be sent in due course. The cheque was not honoured at the bank. In an action brought by L.'s administrators, it was held by ACTON, J., that under the terms of the provisional acceptance first sent to L., the company was not liable, because there was a material change in L.'s health before the conclusion of the contract, and this was not disclosed; and further, that in any event there was a duty cast on L. by law to disclose any material alteration in the risk before the conclusion of the contract, and as the facts with regard to his illness had not been disclosed to the company, the claim on the policy failed.

Difficulties have arisen where proposals for life and accident insurances though signed by the applicant were filled in not by him but by the agent of the insurance company. The problem in these cases is this: if the agent has been informed of the true facts and either fails to insert them in the proposal or substitutes wrong ones can the assured say that as the company's agent knew the true facts such knowledge must be imputed to the company? In the two following cases it was held that he could not, since an agent of an insurance company is only authorised to submit proposals to the company, and has no power to effect insurance. If such so-called

agent fills in a proposal form for an applicant he acts as the agent of the latter, and not as the agent of the insurer. Thus in *Biggar v. Rock Life Assurance Co.*, [1902] 1 K. B. 516, the agent filled in wrong answers, and the applicant signed without reading the proposal or checking the particulars given. Held, the applicant was guilty of non-disclosure, and the policy was void.

Again, in *Newsholme Bros. v. Road Transport and General Insurance Co.*, [1929] 2 K. B. 356, an agent was told the true facts, but for some unexplained reasons filled in wrong answers, and the applicant signed without checking what the agent had written. The Court of Appeal held that the insurers were not liable. SCRUTTON, L.J., said, at pp. 375, 376:—

"If the answers (that is those actually given verbally) are untrue and he (*i.e.* the agent) knows it, he is committing a fraud which prevents his knowledge being the knowledge of the insurance company. If the answers are untrue, but he does not know it, I do not understand how he has any knowledge which can be imputed to the insurance company. In any case I have great difficulty in understanding how a man who has signed, without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue, and a promise that they are true, and the basis of the contract, can escape from the consequences of his negligence by saying that the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed."

Compare also *Howatson v. Webb*, [1908] 1 Ch. 1, illustrated *supra*, p. 99.

DAWSONS, LTD. v. BONNIN,
[1922] 2 A. C. 413

Where by the terms of a policy of insurance the proposal is made the basis of the contract, the insurers will not be liable if any of the statements contained in the proposal are untrue, whether they are on material points or not.

Facts of the Case

The respondents (Bonnin and Others) issued a policy to the appellants (Dawsons Ltd.) insuring the appellants' motor lorry against loss by fire for £500, and against claims by the public for £1,000. The appellants were induced to insure the lorry with the respondents by Hamilton, an insurance agent, and the particulars on the proposal form were filled up by H. in the

presence of the appellants' secretary, who then signed it. When so filled up and signed the proposal contained (*inter alia*) the following particulars :—

- “ 2. Proposer's address—46 Cadogan Street, Glasgow.
- “ 4. State full address at which the vehicles will usually be garaged—Above address.”

In fact there was no accommodation for motor lorries at 46 Cadogan Street, and the lorry was garaged at the appellants' garage elsewhere, but when the secretary signed the proposal he did not notice that the answer to question 4 was inaccurate.

The proposal was accepted, and the respondents duly issued the policy to the appellants. The body of the policy referred to the proposal and contained the following clause : “ Which proposal shall be the basis of this contract and be held as incorporated herein.” The policy was also expressed to be subject to the conditions on the back, and condition 4 read as follows :—

“ Material misstatement or concealment of any circumstance by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void.”

Some months later the lorry was destroyed by fire at the garage where it was usually kept, and the appellants made a claim under the policy, but the respondents contended that the policy was void, because of the untrue statement as to where the lorry would be garaged.

Decision

On appeal, it was held by the **House of Lords** that although the statement in question was not material within the meaning of the above condition 4, nevertheless the recital in the policy that the proposal should be the basis of the contract was a separate and independent provision, and was not qualified by the terms of condition 4, and as the statement in the proposal as to the place of garaging the lorry was untrue, the claim of the appellants under the policy failed.

Viscount CAVE, in the course of his judgment, said :—

“ Upon the whole, it appears to me, both on principle and on authority, that the meaning and effect of the basis clause, taken by itself, is that any untrue statement in the proposal, or any breach of its promissory clauses, shall avoid the policy, and if that be the contract of the parties, it is fully established, by decisions of your Lordships' House, that the question of materiality has not to be considered. But it is contended on behalf of the appellants that the 'basis' clause is limited or

qualified by the fourth condition on the back of the policy . . . and it is argued that, having regard to this condition, a mis-statement in the proposal does not avoid the policy unless it is a material misstatement. I do not take that view. The 'basis' clause and the fourth condition do not cover the same ground. The former includes promissory statements which are apparently not within the condition, and the condition covers misstatements and concealments outside the proposal with which the 'basis' clause is not concerned. I think the two clauses are independent and cumulative provisions, each of which must take effect."

NOTES

In *Dawsons, Ltd. v. Bonnin* the policy provided that the truth of the statements contained in the proposal form should be the basis of the policy. Accordingly, the untruth of any statement, however trifling, cut away part of the basis for the insurer's promise and discharged the latter. By inserting this warranty of truth or "basis clause" in policies insurers save themselves the trouble of proving that untrue statements by the assured in the proposal form were material, in other words, that, but for the untruth, they would not have accepted the risk for the premium agreed.

This proof of materiality was well illustrated in *Mutual Life Insurance Company of New York v. Ontario Metal Products Co., Ltd.*, [1925] A. C. 344, where no "basis clause" was contained in the policy. In that case one, Schuch, was asked to state in a life insurance proposal what "illnesses, diseases, injuries or surgical operations" he had had since childhood. In his answer he did not say that during the preceding five years, when he had worked very hard and had never missed a day at the office, he had for some months at a time received hypodermic injections of a tonic, because he felt overworked. When the assured died the company refused payment, but the Court declared the absence of this information did not amount to an inaccuracy. The assured's run-down condition through overwork or lack of exercise did not fall under the heads "illnesses, diseases, injuries or surgical operations." A man who was able to attend his office every day, and all day, and to do exacting work in a competent way could not be described as suffering from illnesses, even if he was pale and felt over tired at times. Still less could a hypodermic injection be described as a surgical operation. In this respect Mr. Schuch was not guilty of inaccuracies, and the question of materiality did not arise.

But in another question the assured was asked for the name of any physician who had treated him during the last five years before he took out the insurance. To this he replied that he had received no treatment during the period in question, and this was obviously untrue. Nevertheless, the Court refused to invalidate the policy on this ground, since the untruth was not material in the circumstances. The result of the medical examination for the insurance had revealed excellent

health, and the physician who administered the tonic said in evidence, had the company asked him, he would have given a good report. On this evidence the Court found that the company would have issued the policy at the agreed premium even if Schuch had told the truth and named his doctor during the last five years. The Court held that the finding of untruth

"would have been conclusive against the respondents had the policy been in the same form as that in *Dawsons, Ltd. v. Bonnin*. There the fact that an inaccurate answer was given to a question in the application form, although in itself of no materiality, was held to invalidate the policy, because the accuracy of the assured's answers was made a basic condition of the contract. In other words, the assured warranted the truth of the representations he made."

This case was different. True,

"all of the questions may be presumed to be of importance to the insurer who causes them to be put, and any inaccuracy, however unimportant in the answers, would, in this view, avoid the policy . . . (but) the appellants' counsel frankly conceded that materiality must always be a question of degree, and therefore to be determined by the Court, and suggested that the test was whether, if the fact concealed had been disclosed, the insurers would have acted differently, either by declining the risk at the proposed premium or at least by delaying consideration of its acceptance until they had consulted the physician. If the former proposition were established in the sense that a reasonable insurer would have so acted, materiality would, their Lordships think, be established, but not in the latter if the difference of action would have been delay and delay alone. In their view, it is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium."

In this case the disclosure would have made no difference.

"Had the facts concealed been disclosed, they would not have influenced a reasonable insurer so as to induce him to refuse the risk or to alter the premium . . . The non-disclosure or mis-statement was not material to the contract and therefore . . . is no ground for avoiding it."

It should, however, be observed that the word "warranty" does not always mean a promise the breach of which avoids the policy. It may only imply a general description of the risk, so that, when the risk is temporarily changed the policy ceases to apply, but will attach once more when the original position is re-established. Thus the words "warranted no St. Lawrence October-April" in a policy of

marine insurance do not mean that if the ship enters that area during the period in question the policy is avoided, only that she is not covered while there. Again in *Morgan v. Provincial Insurance Co., Ltd.* (1932), 48 T. L. R. 217, the assured stated in the proposal form that his lorry was used for carrying coal, and this was included in the policy which covered the lorry. In fact the lorry was occasionally also used for the haulage of timber. After unloading a quantity of timber the lorry proceeded on its way carrying coal only and a collision occurred. The insurers denied liability; they contended that the policy had been avoided by the previous hauling of timber. But it was held that they were liable, since the statement regarding the use of the lorry for carrying coal was not a warranty in the strict sense, but only a description of the risk, and since at the time of the accident coal alone was carried the journey in question was covered by the policy.

(1) **HARSE v. PEARL LIFE ASSURANCE CO.,**
 [1904] 1 K. B. 558

(2) **HUGHES v. LIVERPOOL VICTORIA LEGAL FRIENDLY SOCIETY,**
 [1916] 2 K. B. 482

Where a life policy is taken out by a person who has no insurable interest in the life assured, and so the policy is illegal, an action will lie for recovery of the premiums paid if the person taking out the policy was induced to do so by fraudulent misrepresentation on the part of the insurance company's agent, but not otherwise.

Facts of the First Case

On the suggestion of the defendants' agent, the plaintiff agreed to insure the life of his mother with the defendants, the proposal form stating the pecuniary interest in the life assured to be: "Son, for funeral expenses." The plaintiff's father was alive but was paralysed. Later, the plaintiff was induced by the defendants' agent to take out a second policy on his mother's life with the defendants. That proposal form purported to be signed by the mother, but the plaintiff stated that the policy was effected for his benefit, and the mother denied that she had signed the proposal form.

When, some years later, the plaintiff was informed that the policies were void for want of insurable interest, he brought an action to recover the premiums paid by him under the policies,

amounting to £43 8s. The jury found (*inter alia*) that the agents did not make any false statements ; that they did represent that the policies were good ones, but were not guilty of any fraud.

Decision in the First Case

The **Court of Appeal** held that the plaintiff was not entitled, on the facts, to recover the premiums paid, and entered judgment for the defendants.

In his judgment, **ROMER, L.J.**, said :—

" Assuming that the two policies are void because they were illegal, it is clear that the plaintiff cannot recover the premiums that he has paid unless he can make out that he is not in *pari delicto* with the defendant company. Can he be said to have established that position ? To do this, reliance is placed on the statements made by the agent of the company. In my opinion there was no misstatement of fact, and it is further clear that there was no fraud—that it was not a case of oppression or duress, and that it was not a case of an advantage taken by a clever man over an ignorant one. The agent, like the plaintiff, had forgotten or mistaken the law. The finding of the jury amounts to this—that the agent had the belief that the policies were good. . . . It appears to me that the parties must be taken to have been in *pari delicto*, and that the company cannot stand in a worse position than their agent."

Facts of the Second Case

In 1908 and 1909, Thomas effected five policies with the defendants, two on the life of Mrs. J., one on the life of J. M., and two on the life of T. P., the total amounts assured being £65 8s. Thomas said Mrs. J. owed him money, but that the defendants' agent, Evans, forced him to take out the other three policies. After a short time Thomas decided to allow the policies to drop, and he burnt them.

Later, in December, 1910, the agent, Evans, approached the plaintiff with a view to her keeping on these five policies. She stated that Lloyd (the defendant's superintendent) and Evans came to see her, and told her that arrears were owing on the policies, but that if she paid the arrears and all future premiums, everything would be all right. She believed that, and paid the arrears, £3 14s. 2d. She said that later Evans came alone, bringing five duplicate policies ; she noticed that they were duplicates, whereupon Evans assured her that everything would be all right. She believed that, and paid the subsequent premiums on the policies.

Thomas was never asked to sell or to consent to any sale of the policies, nor did he ask for the issue of any duplicate policies.

The application to the head office to issue the duplicate policies was a printed form filled up in the handwriting of Evans, and it gave no reason for the issue of duplicates. It appeared that Thomas knew nothing of what Lloyd and Evans were doing with regard to the policies.

Later, Lloyd left the defendants' service and after a call from a new superintendent, the plaintiff took advice, and refused to pay any more premiums, and brought this action to recover from the defendants the sum of £52 13s. 6d., premiums paid by her. The jury found (*inter alia*) that the plaintiff was induced to take over the policies by the fraudulent representation by Lloyd to the plaintiff that by paying the arrears and keeping up the premiums everything would be all right, and that she was induced to pay the premiums by the fraudulent representation by Evans, when she knew that the policies were duplicates, that everything would be all right. On further consideration, SCRUTTON, J., held that the plaintiff could not recover because of the provisions of the Assurance Companies Act, 1909, section 23, and section 36 (3). The plaintiff appealed.

Decision in the Second Case

It was held by the **Court of Appeal** that as the plaintiff had been induced by the fraudulent representations made by Lloyd and Evans, the servants of the defendants, the parties were not in *pari delicto*, and therefore the plaintiff was entitled to recover the premiums paid, and that the Act of 1909 did not affect her right to do so.

SWINFEN EADY, L.J., in the course of his judgment, said:—

“ In my judgment the present is a clear case of fraud established to the satisfaction of the jury. . . . In *Harse v. Pearl Life Assurance Co* ” (above) “ and in *Evanson v. Crooks* (1911), 106 L. T. 264, there was no fraud, and the plaintiff was in *pari delicto* and so failed to recover; but those cases must not be regarded as deciding that where a person is induced to insure a life in which he has no insurable interest by an insurance agent making a misrepresentation of fact, or of mixed fact and law, the parties are necessarily in *pari delicto* . . . ”

And BANKES, L.J., said:—

“ Given fraud, the authorities seem to me to be all one way, namely, that an innocent plaintiff is entitled to say that he is not in *pari delicto* with the defendants whose agents by a false and fraudulent representation induced him to believe that the transaction was an innocent one, and one which was enforceable in law.”

NOTES

These cases illustrate in the field of insurance law the application of the important principle in *Kearley v. Thomson* (1890), 24 Q. B. D. 742, *supra*, p. 36, relating to the recovery of money paid under an illegal contract.

Other cases, in which actions for the recovery of premiums paid in respect of policies in which there was no insurable interest, failed, on the ground that there was no evidence of fraud on the part of the insurance companies' agents, were *Phillips v. Royal London Mutual Insurance Co., Ltd.* (1911), 105 L. T. 136, and *Eavason v. Crooks* (1911), 106 L. T. 264. On the other hand, two cases in which such actions succeeded on the ground of fraudulent representations by the companies' agents were *British Workman's and General Assurance Co. v. Cunliffe* (1902), 18 T. L. R. 502, and *Tofts v. Pearl Life Assurance Co.* (1914), 31 T. L. R. 29.

(1) MACAURA v. NORTHERN ASSURANCE CO., LTD.,

[1925] A. C. 619

(2) ROGERSON v. SCOTTISH AUTOMOBILE AND GENERAL INSURANCE CO., LTD.

(1931), 146 L. T. 26

As a general rule, a continuance of insurable interest down to the time of the loss or damage is essential to a claim under a policy of insurance.

Facts of the First Case

The plaintiff was the owner of nearly all the shares in, and the only substantial creditor of a timber company. He insured the timber in his own name with the defendants. Most of the timber was destroyed by fire, and the plaintiff claimed the insurance money. The insurers denied that he had any insurable interest in the timber.

Decision in the First Case

It was held in the **House of Lords** that neither a shareholder in nor a creditor of a limited company had an insurable interest in the assets of the company.

Lord BUCKMASTER said, at pp. 625 *et seq.* :—

" It must . . . be admitted that at first sight the facts suggest that there really was no person other than the plaintiff who was interested in the preservation of the timber. . . . He would receive the benefit of any profit and on him would fall the burden of any loss. But the principles on which the decision of this case rests must be independent of the extent of the interest held. The appellant could only insure either as a creditor or as a shareholder of the company. . . . As a creditor his position appears to me quite incapable of supporting the claim. . . . It is true that since the case of *Godsall v. Boldero* (1807), 9 East 72, where a creditor of Mr. Pitt was held entitled to effect an insurance upon his life, his interest of a creditor has always been recognised as sufficient to support a life policy, but this depends, as was said by Lord Ellenborough, upon the means and probability of payment which the continuance of a debtor's life affords to his creditors and the probability of loss which would result from his death. In the case of *Moran, Galloway & Co. v. Uzielli*, [1905] 2 K. B. 555, 562, where a creditor for ships' necessaries was held entitled to insure the ship, the decision rested upon the fact that the creditor had a right in *nem* against the vessel, and the learned judge said that 'in so far as the plaintiffs' claim depends upon the fact that they were ordinary creditors of the shipowners for an ordinary unsecured debt, I am satisfied that it must fail. The probability that if the debtor's ship should be lost he would be less able to pay his debts does not, in my judgment, give to the creditor any interest, legal or equitable, which is dependent upon the safe arrival of the ship.' This is, in my opinion, an accurate statement of the law, and the appellant therefore cannot establish his claim as creditor.

" Turning now to his position as shareholder, this must be independent of the extent of his share interest. If he were entitled to insure holding all the shares in the company, each shareholder would be equally entitled, if the shares were all in separate hands. Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up. If he were at liberty to effect an insurance against loss by fire of any item of the company's property, the extent of his insurable interest could only be measured by determining the extent to which his share in the ultimate distribution would be diminished by the loss of the asset—a calculation almost impossible to make. There is no means by which such an interest can be definitely measured and no standard which can be fixed of the

loss against which the contract of insurance could be regarded as an indemnity."

And Lord SUMNER said, at p. 630:—

"The debt was not exposed to fire nor were the shares, and the fact that he was virtually the company's only creditor, while the timber was its only asset, seems to me to make no difference. He stood in no 'legal or equitable relation to' the timber at all. He had no 'concern in' the subject insured. His relation was to the company, not to its goods, and after the fire he was directly prejudiced by the paucity of the company's assets, not by the fire."

Facts of the Second Case

By a policy of insurance dated May 23rd, 1928, the defendant Insurance Co. agreed to indemnify the plaintiff against (*inter alia*) all sums which he should become legally liable to pay as compensation for bodily injury caused to any person by the motor car described in the schedule, which was a Lambda Lancia, with torpedo body, numbered XU5190. The policy also contained the following clause:—

"This insurance shall cover the legal liability as aforesaid of the assured in respect of the use by the assured of any motor-car (other than a hired car) provided that such car is at the time of the accident being used instead of the insured car."

Later the plaintiff bought a new Lancia car, and in part payment for the new car he gave up the old one.

While he was driving the new car on July 28th, 1929, he collided with another car, and a claim was made against him by an occupant of that other car. The plaintiff then claimed to be indemnified by the insurance company under the above policy in respect of that liability, but the company repudiated liability and contended that the new Lancia car was not being used by him "instead of" the former car at the time of the accident.

ROCHE, J., decided in favour of the plaintiff, but, on appeal, the **Court of Appeal** reversed this decision, and the plaintiff now appealed to the **House of Lords**.

Decision in the Second Case

The **House of Lords** held that the new Lancia car was not being used by the plaintiff "instead of" the former car, within the meaning of the policy, and that the policy only covered another car which was being used as a substitute for the former car

during the time that the former car was still the subject-matter of the policy.

Lord BUCKMASTER said :—

“ The contention for the appellant is that any car which, during the period of the insurance, is in fact taking the place of the insured car, is within the meaning of the phrase, and that an accident caused by its use is an accident, the liability in respect of which is covered by the policy. That is not my view of the matter. To me this policy depends upon the hypothesis that there is in fact an insured car. When once the car which is the subject of this policy is sold, the owner's rights in respect of it cease, and the policy so far as the car is concerned is at an end . . . It is my opinion that the clause assumes that there is the insured car, the use of which, if an accident arises, would entitle the assured to the benefit of the policy. If, instead of the car that could be so used, another is used in its place, then the car that is used in its place is entitled to the same privilege as the original car. But, if it be assumed that the original car be sold and another car taken in its place, the result would be, if the appellant's contention were correct, that it might be possible to shift the insurance from car to car during the whole period for which the policy runs. . . . My lords, I do not for a moment believe that that was the intention of this policy. . . .”

In the Court of Appeal, SCRUTTON, L.J., said :—

“ The parties in this case could not be said to have intended to depart from the cardinal principle of insurance law that a person could not recover for a loss in respect of a subject-matter in which he no longer had any insurable interest.” (See 47 T. L. R., p. 47.)

NOTES

The rule that the insurable interest must have attached at the time of the loss is well illustrated by *Anderson v. Morice* (1875), L. R. 10 C. P. 609. There, in effect, a full cargo of rice was insured for a voyage from Rangoon to London on the ship *Sunbeam*. The rice was not to become the assured's property until a full cargo had been shipped. When three-fourths were on board, ship and cargo were lost, and it was held that the assured could not recover, since his risk did not commence, and therefore his interest, did not attach until a full cargo had been loaded.

The rule that a continuance of insurable interest is essential does not apply to life insurance. There, it is only necessary that the person effecting the insurance should have an insurable interest in the life assured at the time of taking out the policy; it is not essential that he should also have an insurable interest at the date of

the death. For instance, a creditor can insure his debtor's life to the amount of the debt, and if afterwards the debt is repaid, the creditor can still keep the policy in force, and claim on it when the assured dies, although he no longer has an insurable interest in the life of the assured. See also *Dalby v. India and London Life Assurance Co.* (1854), 15 C. B. 365, dealt with on p. 230.

It should also be noted that a husband has an insurable interest in the life of his wife irrespective of any pecuniary interest, see *Griffiths v. Fleming*, [1909] 1 K. B. 805; and so has the wife in the life of her husband, see *Reed v. Royal Exchange Assurance Co.* (1795), Peake (Add. Cas.) 70. See Stevens' Elements of Mercantile Law, 10th Edn., p. 410.

In contrast to *Macaura's Case, supra*, reference should be made to those cases where a shareholder in a limited company insures not the assets of the company but the success of an adventure entered into by it. Thus in *Wilson v. Jones* (1867), L. R. 2 Ex. 139 the Court of Exchequer Chamber held that a shareholder in a cable company had an insurable interest in the successful laying of a submarine cable between Ireland and Newfoundland. Since his dividends depended on the profits made by the company his interest was sufficiently precise to be insurable.

See, as to insurable interest, Stevens' Elements of Mercantile Law, 10th Edn., pp. 410, 412, 418.

MARINE INSURANCE

WARRANTY OF SEAWORTHINESS

QUEBEC MARINE INSURANCE CO. v. COMMERCIAL BANK OF CANADA

(1870), L. R. 3 P. C. 234

In a contract of marine insurance for a voyage there is implied a warranty that the vessel is seaworthy.

Facts of the Case

The s.s. *West* was insured for a voyage from Montreal to Halifax in Nova Scotia, a voyage partly on inland waters, partly at sea. At the time when the policy was made and when she left Montreal there was a crack of 3 or 4 inches in the surface of the

boiler ; this defect rendered her unfit for the salt-water part of the voyage. Six hours after the *West* got into salt water she became unmanageable in consequence of the defect, and she was brought back to port and repaired. She sailed again and shortly afterwards her rudder broke, and the vessel stranded in a hurricane and became a total loss.

In an action on the policy the underwriters denied liability on the ground of the unseaworthiness of the ship at the beginning of the voyage, but at the trial the underwriters were held liable because the defect had been properly repaired before the vessel was lost ; the judgment was affirmed on appeal.

Decision

This decision was reversed in the **Judicial Committee of the Privy Council**. The board took the view that the initial unseaworthiness of the vessel had discharged the underwriter from liability. Once the ship had sailed it was immaterial that the defect had been repaired before the loss occurred.

Lord PENZANCE, giving the opinion of the Board, said, at p. 240 :—

" Now, it is undoubted, that the vessel, from the fact of the boiler being in the state in which it was found to be as soon as the vessel entered salt water, was not fit to encounter the seas, and for that reason, and that reason alone, she put in to repair. Well, then, can it be said that the vessel sailed in a seaworthy state ? The general proposition is not denied, that in voyage policies there is an implication by law of a warranty of seaworthiness (241), and it was not contended that the vessel was seaworthy when she found herself in salt water ; but it has been suggested that there is a different degree of seaworthiness required by law, according to the different stage or portion of the voyage which the vessel successively has to pass through, and the difficulties she has to encounter ; and no doubt that proposition is quite true.

" The case of *Dixon v. Sadler* (1839), 5 M. & W. 405, and the other cases which have been cited, leave it beyond doubt that there is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases, as in a case that has been put forward of a whaling voyage, for some definite, well-recognised, and distinctly separate stage of the voyage. This principle has been sanctioned by various decisions ; but it has been equally well decided that the vessel, in cases where these several distinct stages of navigation involve the necessity of a different equipment or state of seaworthiness, must be properly equipped, and in all respects seaworthy for each of these stages

of the voyage respectively at the time when she enters upon each stage, otherwise the warranty of seaworthiness is not complied with.

" It was argued that the obligation thus cast upon the assured to procure and provide a proper condition and equipment of the vessel to encounter the perils of each stage of the voyage, necessarily involves the idea that between one stage of the voyage and another he should be allowed an opportunity to find and provide that further equipment which the subsequent stage of the voyage requires; and no doubt that is so. But the equipment must, if the warranty of seaworthiness is to be complied with, be furnished before the vessel enters upon that subsequent stage of the voyage which is supposed to require it.

" Now, in this case, supposing there were any such subsequent stage as has been argued, and that there were any such necessity for a different equipment at one period of the voyage than that which existed at another, which is by no means plain, can it be said, that at the commencement of that portion of her voyage which was to be made in salt water, the vessel was fit to encounter the perils of it, or in other words, was seaworthy?

" It is plain that this could not be asserted with truth, because (242) from the moment that she entered the salt water the defect became apparent, and she was actually disabled by the action of the salt water upon the defective boiler.

" It seems, therefore, to their Lordships that the warranty of seaworthiness has not been complied with."

With regard to the contention of the assured that the defect had been repaired prior to the loss his Lordship held that when once the warranty was broken the insurer was finally discharged from his obligation, unless indeed he had waived the breach, of which there was no suggestion in this case.

NOTES

The warranty of seaworthiness does not apply to time policies on ships, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness. This was laid down in *Gibson v. Small* (1853), 4 H. L. C. 353, and in *Dudgeon v. Pembroke* (1877), 2 App. Cas. 284; the rule has since been made statutory in s. 39 (5), Marine Insurance Act, 1906. Moreover, the law provides that the insurer has a good defence against an action on the policy only if the loss occurred owing to the unseaworthiness to which the assured was privy. The importance of this rule was well illustrated by *Thomas v. Tyne and Wear Steamship Freight Insurance Association*, [1917] 1 K. B. 938. In that case a ship was insured under a time policy. When she was sent to sea she was unseaworthy in two respects,

namely her hull was damaged and her crew insufficient. The assured knew of the latter but not of the former defect. The ship was lost owing to the bad state of her hull. It was held that the insurers were liable. ATKIN, J. said at p. 940:—

"In the case of insurance under a time policy the intention was that the assured should be unable to recover in respect of a loss occasioned by his own fault. That was the rule under the law as it existed before the Act. It was always necessary to show that the loss was the result of some misconduct. Now the statute has defined the degree of misconduct required as sending the ship to sea in an unseaworthy state with the privity of the assured. Where a ship is sent to sea in a state of unseaworthiness in two respects, the assured being privy to the one and not privy to the other, the insurer is only protected if the loss was attributable to the particular unseaworthiness to which the assured was privy. The other view would be unreasonable. For instance, if a ship were sent to sea with a defective equipment, and subsequently during the course of the voyage became unseaworthy in some totally different respect which caused its loss, if the present insurers' contention is right the assured could not recover. I think the arbitrator's construction was correct. There must be judgment for the claimant."

On the other hand, if goods are insured for a voyage, and the ship is unseaworthy and the goods are lost, even the innocent shipper of goods cannot at law recover under the policy. This was decided by Lord Mansfield in *Oliver v. Cowley* (1765), 1 Park Ins. 470. And this is still the law. See *Sleigh v. Tyser*, [1900] 2 Q. B. 336. However, it is provided in s. 34 (3), of the Marine Insurance Act, 1906, that the insurer may waive any warranty, and marine insurers have consistently done so for some time past in order to relieve the difficult situation in which innocent shippers of cargo would find themselves if the law were strictly applied. Underwriters now usually pay the loss and avail themselves by subrogation of the assured's remedies against the owner of the unseaworthy ship. See Arnould, *Marine Insurance*, s. 689, n. (s.). This is often done by making use of the Institute Cargo Clauses under one of which seaworthiness is admitted as between insurer of cargo and insured.

As to seaworthiness in contracts of carriage, see *The Europa, infra*, p. 289.

The student should note that in cases of express warranty the exact form of words is immaterial provided the intention of the insured to enter into a warranty is clear. It is not, for example, necessary that the actual word "warranty" should be used. Indeed, the word is very often used with quite other meanings, as in the expression "warranted free from average" which appears in the memorandum at the foot of the Lloyds Marine Policy (see Stevens' *Elements of Mercantile Law*, 10th Edn., p. 426).

DEVIATION

**JAMES MORRISON & CO., LTD. v. SHAW,
SAVILL AND ALBION CO., LTD.,**

[1916] 2 K. B. 783

A voyage policy of marine insurance is avoided by deviation.

The facts of the decision in this case are fully set out on p. 285, and reference should be made to that page. The meaning of deviation is the same in Marine Insurance and Carriage by Sea. If a ship is insured and deviates from its course, the underwriter is discharged. Mere intention to deviate does not constitute deviation, as long as the contract route has not in fact been left. Thus, in *Heselton v. Allnutt* (1813), 1 M. & S. 46, a ship was insured from Heligoland to Memel. The captain intended to call at Gothenburg first to find out whether it would be safe to proceed to Memel. The call at Gothenburg would have constituted a deviation. However, while the ship was still on the common route to Gothenburg and Memel, she was lost; and it was held that she had not in fact deviated, the intention to do so was immaterial, and the insurer was liable.

But when the ship has once deviated the policy is discharged, and the underwriter will not have to pay even if the ship is lost after having returned to her contract route.

Though the ship deviates from her proper course the port of destination remains the same. Sometimes, however, even this is changed. In that case it is not a deviation, but a change of voyage. The distinction is important because, whereas mere intention to deviate does not discharge the underwriter's liability, intention to change the voyage does, because the actual voyage becomes different from the one insured. If, for instance, a ship is insured from London to a port in the Mediterranean, and while on her voyage to the Straits of Gibraltar, receives orders by wireless to proceed instead to a port on the West Coast of Africa, the insurance terminates at the moment the captain receives the orders and decides to comply with them; it is immaterial that for some time he continues to steer a course which is common to both ports.

Closely connected is the abandonment of the voyage; this occurs if the ship immediately starts for a destination other than that set out in the policy. In *Wooldridge v. Boydell* (1778), 1 Doug. K. B. 16, a ship was insured "at and from Maryland to Cadiz." Actually she was cleared from Maryland for Falmouth, and the bills of lading on the goods carried were also made out for

Falmouth. The vessel was captured while on a common course to Cadiz and Falmouth. It was held that the underwriters were not liable. Lord MANSFIELD, C.J., said :—

“ That was never the voyage intended, and consequently is not what the underwriters meant to insure.”

The assured had contended that the same considerations as in deviation cases should apply so that the vessel would have been covered until the routes actually divided, but BULLER, J., said :—

“ There cannot be a deviation from what never existed. The weight of evidence is that the voyage was never designed for Cadiz.”

Frequently policies contain clauses covering the assured for deviation and change of voyage at an additional premium to be arranged. Many decisions have dealt with such clauses, but they are too technical to be included in this note. It should, however, be observed that such clauses can only operate if the risk has once attached ; where the voyage has been abandoned at the outset, as in *Wooldridge v. Boydell, supra*, the clause cannot apply, and the policy is discharged in spite of the deviation and change of voyage clause. For example, in *Simon, Israel & Co. v. Sedgwick*, [1893] 1 Q. B. 303, goods were insured from London to a port in Spain “ this side of Gibraltar.” The policy contained the clause “ deviation and/or change of voyage to be held covered at a premium to be arranged.” Through a blunder of the ship’s agents the vessel was sent from London to Cartagena, which is not “ this side of Gibraltar.” Before the ship reached Spain the goods were lost, and the Court of Appeal held that the underwriters were discharged. The clause could not operate, since the voyage had been abandoned at its inception, and the policy, with the clause, had never attached.

Probably if a ship had been insured “ at and from London to Seville,” and had then sailed for Cartagena, the policy would have attached and the clause applied, because the policy would have attached as soon as the vessel was in London, and the sailing for another destination would have amounted to a change and not an abandonment of the voyage.

CONSTRUCTIVE TOTAL LOSS

(1) **RODOCONACHI v. ELLIOTT**
(1874), L. R. 9 C. P. 518

(2) **POLURRIAN STEAMSHIP CO., LTD. v. YOUNG,**
[1915] 1 K. B. 922

Nature of constructive total loss.

Facts of the First Case

Goods were insured from Shanghai to London against, among other perils, restraint of kings and princes, the insurance to cover land transit from Marseilles through France. The goods arrived in Paris on September 13th, 1870, when the German armies were closing in on the town. Already the northern railway, by which the goods were to be sent on to Boulogne, was under the control of the German military, so that the goods could not be forwarded. By September 19th the town was completely invested, so that it was impossible to remove the goods and bring them to London. When this state of affairs had lasted until October 7th the assured gave notice of abandonment of the goods to the underwriters and claimed for a constructive total loss.

Decision in the First Case

It was held in the **Court of Exchequer Chamber** (1874), 9 C. P. 518, that the siege by the German armies amounted to a restraint by princes, that consequently the goods were lost to the assured for an indefinite time, and that they were entitled to recover against the underwriter as for a constructive total loss.

In that Court BRAMWELL, B. said, at p. 521 :—

“ There remains the question of whether there has been a loss from a peril within the policy. For if so, it seems to us there was a right to abandon, there being a loss of the goods, the assured having lost all control over them for an indefinite time, which might extend to such a period as to cause at least a loss or failure of the particular adventure, and possibly a total loss of the goods, or more or less damage to them. In such a case the assured has a right to throw the risk on the underwriter.”

After reviewing the facts of the case the learned Baron continued, at p. 522 :—

“ The result of this state of things undoubtedly was that the goods were prevented from leaving Paris, and the whole adventure was broken up, and so continued at the time when the notice of abandonment was given and up to the commencement of the action. We are of opinion that this amounts to a constructive total loss of the goods, by restraint of kings and princes within the terms of the policy. This is not a mere temporary retardation of the voyage, but a breaking up of the whole adventure. It is well established that there may be a loss of goods by a loss of the voyage in which the goods are being transported, if it amounts, to use the words of Lord Ellenborough, ‘ to a destruction of the contemplated adventure’: *Anderson v. Wallis* (1813), 2 M. & S. 240; *Barker v. Blakes* (1808), 9 East, 283.”

Facts of the Second Case

The *Polurrian*, a British ship, was insured, among other risks, against the consequences of warlike operations. She sailed on October 9th, 1912, from Newport to Constantinople with a cargo of coal, consigned to English merchants. On October 17th, war was declared between Greece and Turkey, and on October 28th the Greek Government declared fuel to be a contraband of war. The ship was captured by a Greek man-of-war on October 25th, and detained until December 8th, 1912, when she was released. On October 26th, the assured gave notice of abandonment to the underwriters. PICKFORD, J., held that the owners were not entitled to do so.

Decision in the Second Case

The decision was affirmed in the **Court of Appeal**. Under the law before the Marine Insurance Act, 1906, the ship would have been a constructive total loss, but s. 60 (2) (i) (a) provided that the assured can claim on the policy as for a constructive total loss only if it is "unlikely" that the ship or goods insured can be recovered. In this case the owners had not proved this, they had only shown that recovery of possession was uncertain, which was no longer sufficient.

KENNEDY, L.J., said, at p. 934:—

"Even if the *Polurrian* should be released, either by the Greek Government or by the decision of a Prize Court, the date of such release was obviously uncertain; it might be weeks or months, or longer, before the matter would be settled. Assuming that this was, as it appears to me to have been, the true position of affairs, I am of opinion that if the present action had come to be decided before the Marine Insurance Act, 1906, had come into force, the plaintiffs would have been held to have been entitled to recover upon the policy of insurance as for a constructive total loss."

p. 936. "The section which governs the present case is s. 60, sub-ss. 1 and 2. So far as it relates to a constructive total loss by capture that section runs thus: '(1) Subject to any express provision in the policy, there is a constructive total loss where the subject matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable. . . . (2) In particular there is a constructive total loss—(i) where the assured is deprived of the possession of his ship . . . by a peril insured against and (a) it is unlikely that he can recover the ship.'

"One may, I think, without disrespect, express some regret that the two expressions 'reasonably abandoned on account of its actual total loss appearing to be unavoidable' and 'unlikely

that he can recover the ship' should be used apparently to describe the same position of things; for in my view, at any rate it is one thing to predicate that a total loss of a thing reasonably appears to be unavoidable and another to predicate that its recovery is unlikely. Taking, however, the latter and, as it seems to me, the less severe test of the right to treat a capture as constituting a constructive total loss, I think that the statute has modified the pre-existing law to the disadvantage of the assured. One is always properly afraid of incompleteness in attempting a definition; but I venture to say that the test of 'unlikeness of recovery' has now been substituted for 'uncertainty of recovery.' The assured must now show two things: the first, that he has been deprived of the possession of his ship; the second, that it is unlikely that he can recover it. Whence the statute derived the phrase 'unlikely that he can recover' as expressing a necessary condition of the assured's right to recover for a constructive total loss by capture I do not know. I have referred to many of the reported capture cases, and I have been unable to find it used judicially in any of them; but there it stands in the section of the Act of Parliament; its meaning is quite clear, and therefore in the present case, to enable the plaintiffs to succeed, they must establish fully (1) that at the date of the commencement of this action they were deprived of the possession of the *Polurrian*; and (2) that it was not merely quite uncertain whether they would recover her within a reasonable time, but that the balance of probability was that they could not do so.

"They have, as my brother Pickford has held, and I quite agree with him, made the first point good—the Greek captors did deprive the plaintiffs of the possession of their ship. Have they also shown that there was more likelihood that the plaintiffs would not, than that they would, recover her? The test is, in my humble judgment, one the application of which in this case is, and generally, in similar cases of capture, would be, very difficult to apply with any sense of satisfaction, because it necessarily involves conjecture and speculation as to what is likely to be the outcome of a number of possible contingencies. Addressing myself, however, to the best of my ability to the question which this s. 60 directs me to consider, my conclusion is that whilst I hold that on October 26th—the crucial date, because the date of the commencement of the plaintiffs' action—the recovery of the *Polurrian* by her owners was quite uncertain, I do not feel myself justified in holding that the balance of probabilities has been proved to me so clearly against her recovery that I can say that such recovery was 'unlikely.' This being so, the plaintiffs must be held to have failed to make out their case, and this appeal must be dismissed."

PROXIMATE CAUSE**HAMILTON FRASER & CO. v. PANDORF & CO.**

(1887), 12 App. Cas. 518

An insurer is only liable to pay for loss which has been proximately caused by a peril insured against.

Facts and decision of this case have been fully set out on p. 284, and reference should be made to that page. Though it deals with carriage of goods, the principle of the proximate cause is the same both here and in insurance. On the one hand, in *Smith v. Accident Insurance Co.* (1870), L. R. 5 Ex. 302, an insurance was taken out against death solely and directly caused by accident, but cover was expressly excluded in the case *inter alia* of erysipelas. The assured cut his foot accidentally against broken earthenware, four days later erysipelas supervened, and of that he died one week after the accident. The erysipelas was caused by the wound without which he would not have contracted it, but it was held that the cut was not the proximate cause within the meaning of the policy, and the executor could not recover.

On the other hand, in *Smith v. Cornhill Insurance Co.* (1938), 54 T. L. R. 869, a policy was effected by which the owner of a motor car was insured, "provided that the death occurs . . . as the result solely of bodily injury caused by violent accidental external and visible means sustained . . . whilst riding in . . . the insured car." While the assured was driving the car it left the road and fell down a ravine, and the assured sustained a severe head injury resulting in serious damage to the brain. In a state of semi-consciousness the assured left the car, wandered about, and stepped into a stream. The shock of entering the water which would but for the injuries have been harmless produced heart failure. It was held that the death was due solely to the accident within the meaning of the policy, and the administratrix was entitled to recover.

Again, in *Leyland Shipping Co., Ltd. v. Norwich Union Fire Insurance Society, Ltd.*, [1918] A. C. 350, a ship was insured under a time policy against perils of the sea, but consequences of hostilities were excepted. While on a voyage from South America to Havre the ship was torpedoed by a German submarine, but though she was struck forward and tended to settle down by the head she reached Havre with the aid of tugs. There the vessel was moored in the inner harbour, where she grounded on each ebb tide and floated again on each flood, but after a few days her bulkheads gave way, and she sank, becoming a total loss. It was held that

the grounding was not a new cause of the loss, but that the proximate cause was still the torpedoing, which had been expressly excepted by the terms of the policy, so that the underwriters were not liable.

CARRIERS

COMMON AND PRIVATE CARRIERS

(1) **NUGENT v. SMITH**

(1876), 1 C. P. D. 423

(2) **BELFAST ROPEWORK CO., LTD. v. BUSHELL,**

[1918] 1 K. B. 210

(a) *Definition of a "Common Carrier."*

(b) *Meaning of the expression "Act of God."*

Facts of the First Case

A company advertised and habitually ran a line of steamers from London to Aberdeen. The plaintiff delivered a mare to the company in London to be carried by one of their steamers to Aberdeen. During the voyage the ship encountered rough weather, in the course of which the mare was injured to such an extent that she died.

The plaintiff sued the defendant, as representing the company, to recover damages for the loss of the mare. The jury found (*inter alia*) that the injury to the mare was caused partly by more than ordinarily bad weather, and partly by the conduct of the mare herself by reason of fright and consequent struggling, without any negligence of the defendant's servants.

Decision in the First Case

It was held by the **Court of Appeal** that the company were common carriers of the mare, but that as the injury to the mare was caused partly by the bad weather and partly by the mare's own struggling, they were not liable. In the course of his judgment COCKBURN, C.J., said :—

"I must observe that, as the vessel by which the mare was shipped was one of a line of steamers plying habitually between given ports and carrying the goods of all comers as a general ship, and as from this it necessarily follows that the owners were common carriers, it was altogether unnecessary . . . to determine

the question . . . as to the liability of the owner of a ship not being a general ship."

And as to an Act of God, JAMES, L.J. (per MELLISH, L.J.), said :—

"The 'Act of God' is a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him. In this case the defendant has made this out."

Facts of the Second Case

The defendant was in business in Liverpool, and on his invoices he described his business as that of automobile engineers, and haulage contractors. He had an automobile agency and sold a few heavy motors. He also had two lorries with which he did his carrying work, and he ran these partly as a means of advertising his motor business, and partly to make money until a purchaser could be found. They were at all times for sale. He sometimes hired lorries as well, when he had more goods to carry than he could accommodate in his own lorries.

The mainstay of his carrying business was that he conveyed sugar from Messrs. Tate's premises in Liverpool to their customers in Manchester and district. But on the return journeys he carried all kinds of Manchester goods except machinery. Customers would ask him to carry their goods from Manchester to Liverpool, and he generally did so, but sometimes he refused when the offers or the terms did not suit him. Sometimes his lorries carried goods to other places as well. He had no regular or tariff charge except for sugar.

The plaintiffs delivered to the defendant 43 bails of hemp, to be carried from Manchester to Liverpool, and in the course of transit a fire broke out and the goods were partially damaged. The fire was not caused by any negligence of the defendant. The plaintiffs sued the defendant in respect of the loss sustained and alleged that he was a common carrier. The defendant denied this, and contended that as he was not negligent, the plaintiffs could not recover the loss from him.

Decision in the Second Case

BAILHACHE, J., held that the defendant was not a common carrier, and therefore the plaintiff's claim failed.

In the course of his judgment, BAILHACHE, J., said :—

“ The liability of the defendant depends solely upon whether he was a common carrier or not. The question of whether a man is a common carrier or not is one of fact. . . . There seems to be a general agreement . . . that to make a man a common carrier he must carry as a public employment ; he must carry for all indifferently ; he must hold himself out as ready to carry for hire as a business and not as a casual occupation *pro hac vice*. . . . For the purposes of my present decision I fall back upon this question, did the defendant, while inviting all and sundry to employ him, reserve to himself the right of accepting or rejecting their offers of goods for carriage, whether his lorries were full or empty, being guided in his decision by the attractiveness or otherwise of the particular offer and not by his ability or inability to carry having regard to his other engagements ? Upon the facts as found by me, I answer that question in the affirmative, and, in my opinion, that answer shows that he is not a common carrier.”

NOTES

It should be observed that a carrier is only a common carrier as regards the kind of goods which he professes and holds himself out as ready to carry for anyone wishing to employ him. It is sometimes assumed, for instance, that railway companies are common carriers of all goods, but that is not so. Railway companies, like other carriers, are only in the position of “ common carriers ” so far as regards the kinds of goods which they profess to carry generally for any member of the public. (See *Johnson v. Midland Rail. Co.* (1849), 4 Exch. 367.) For instance, they are not common carriers of dogs, although bound to provide reasonable facilities for carrying them. (See *Dickson v. Great Northern Rail. Co.* (1886), 18 Q. B. D. 176, per LINDLEY, L.J., at p. 185), for another illustration see *Great Northern Rail. Co. v. L.E.P. Transport and Depository, Ltd.*, [1922] 2 K. B. 742, *infra*, p. 266.

It should also be noted that carriers of passengers (including railway companies) are not common carriers of their passengers, but are only liable for injury or damage caused by the negligence of themselves or their servants. See *Readhead v. Midland Rail. Co.* (1867), 1. R. 2 Q. B. 412. There the plaintiff was a passenger on the defendant railway. During the journey a wheel of one of the carriages broke, and the plaintiff was injured in consequence thereof. It was proved that the accident was caused by a latent defect in the welding, and that before the journey began the wheel was to all appearances strong and sound. Neither the manufacturer nor the railway company were to blame, since there existed no means of detecting the flaw beforehand, all tests having proved satisfactory. It was held that the defendants were not liable. The carrier of passengers for hire must use the utmost care and skill in everything

that concerns the safety of the passengers, but he is under no absolute duty to provide a carriage which is roadworthy at the beginning of the journey. He is not liable to a passenger if the defect could not be guarded against in construction or discovered by subsequent examination.

Originally the only exceptions to the liability as an insurer of a common carrier of goods were cases where the loss or damage was due to the act of God, or of the King's enemies or of the inherent vice of the goods. But under Standard Terms and Conditions A 3, approved under s. 42, Railways Act, 1921, the following exceptions have been added:—Arrest or restraint of Princes, or Rulers, or seizure under legal process; Orders or restrictions imposed by the Government or any Department thereof; Act or omission of the Trader, his servant, or agent; Inherent liability to wastage in bulk or weight, latent defect or inherent defect vice or natural deterioration of the merchandise; or Casualty (including fire or explosion). Yet even to rely on these exceptions the Company must prove that they used all reasonable foresight and care in the carriage of the merchandise.

Only in the following circumstances can the Company claim complete exemption: Where there has been fraud on the part of the trader in respect of merchandise carried under Condition A 3; moreover, under Condition A 17, no liability arises

“ for :—(a) loss of a particular market, whether held daily or at intervals; or (b) Indirect or consequential damages; or (c) Subject to these Conditions, loss, damage or delay proved by the Company to have been caused by or to have arisen from—(i) insufficient or improper packing; or (ii) Riots, civil commotion, strikes, lockouts, stoppage or restraint of labour from whatever cause, whether partial or general; or (iii) Consignee not taking or accepting delivery within a reasonable time.”

In the case of loss or damage due to defective packing, the carrier will not be liable even though he was aware of the improper packing when he received the goods. (See *Gould v. South Eastern and Chatham Rail. Co.*, [1920] 2 K. B. 186.) But he must take reasonable steps in such case to guard against loss or damage. Thus, when a cask of brandy was found to be leaking in the course of transit, but the carrier's servant took no steps to examine the cask or stop the leakage, it was held that this was negligence, and the carrier was liable to the owner of the cask. (See *Beck v. Evans* (1812), 16 East. 244.)

The common law liability of common carriers by land has also been altered by the provisions of the Carriers Act, 1830, as regards certain classes of goods, see *infra*, p. 270 and Stevens' Elements of Mercantile Law, 10th Edn., pp. 461 *et seq.*

Finally, Condition A 4 provides:—

“ The Company shall, subject to these Conditions, be liable for loss proved by the Trader to have been caused by delay to, or

detention of, or unreasonable deviation in the carriage of merchandise unless the Company prove that such delay, or detention, or unreasonable deviation has arisen without negligence on the part of the Company of their servants."

For instance, in *Taylor v. Great Northern Rail. Co.* (1866), 1 C. P. 385, the plaintiff suffered loss in respect of goods carried by the defendants. It had been caused by an accident of a train belonging to the Midland Company which was allowed to run over the defendants' line. Since it was proved that the accident resulted from a Midland official's negligence, in which the defendants were in no way involved, the action failed.

**TURNER v. CIVIL SERVICE SUPPLY ASSOCIATION,
LTD.,**

[1926] 1 K. B. 50

A private carrier is not an insurer of goods carried but is liable only on proof of negligence.

Facts of the Case

The defendants were removal contractors and warehousemen, and they made an agreement with the plaintiff to remove her household goods and furniture from London to Hailsham. One of the conditions of the agreement was that they were not responsible for loss or damage caused by fire. The defendants' servants packed the plaintiff's goods and put them on to a motor lorry in which they were to be carried from London to Hailsham. During the journey a fire broke out, and the lorry and most of the plaintiff's goods were almost entirely destroyed, and some of her goods were delivered in a damaged condition.

The plaintiff claimed from the defendants the value of the goods destroyed and damaged, and the defendants contended that they were not liable because of the condition which protected them from responsibility for damage by fire. The jury found that the fire was caused by negligence of the defendants.

Decision

It was held by SANKEY, J., that the defendants, not being common carriers of the goods, were not liable as insurers, and that, quite apart from any condition, they would not have been liable for an accidental fire, and so the condition in this case must refer to a fire which might be caused by negligence, and therefore, under that condition, the defendants were not liable, although the fire was the result of their negligence.

In giving judgment, SANKEY, J., said :—

" It is admitted that in this case the defendants are not common carriers. What is the position of persons who are not common carriers, that is to say, people who carry goods for reward, but who are not affected by the absolute liability of the common carrier? A carrier who is not a common carrier undertakes to answer for loss arising from his own or his servants' negligence, that is to say, he will be liable for loss arising from the failure to use proper skill and care. But just as a common carrier may exempt himself from liability by using express and unambiguous language, so also a carrier of the class with whom we are now dealing may exempt himself from liability by using proper words."

NOTES

Both common and private carriers may cut down their common law liability, but the difficulties were explained in *Rutter v. Palmer*, [1922] 2 K. B. 87, where BANKES, L.J., said, at p. 90 :—

" A common carrier is liable for the acts of his servants whether they are negligent or not; an ordinary bailee is not liable for the acts of his servants unless they are negligent. If a common carrier would protect himself from responsibility for all acts of his servants he must use words which will include those acts which are negligent, because words which would suffice to protect him from liability for acts properly done by his servants in the course of their service may fall short of protecting him from their negligent acts. If an ordinary bailee used words applicable to the acts of his servants, inasmuch as he is not liable for their acts unless negligent, the words will generally cover negligent acts, although such acts are not specially mentioned, because otherwise the words would have no effect."

Care must therefore be taken what words are used. In *Joseph Travers & Sons, Ltd. v. Cooper*, [1915] 1 K. B. 73, a lighterman excluded liability " for any damage to goods however caused which can be covered by insurance." One barge was negligently left unattended for several hours, and submerged by the rising tide, whereby goods were damaged. But the goods owner could not recover, because the lighterman was protected by the clause against liability. On the other hand, in *Price & Co. v. Union Lighterage Co.*, [1904] 1 K. B. 412, the exception clause was in the same words as that in *Travers v. Cooper*, but the words " however caused " were omitted. When the goods were lost by the negligence of the lighterer's servants, the lighterer was held liable, because the words of the clause did not contain a sufficiently clear exclusion of liability for negligence of servants and had no reference to causation. This is made clear in KENNEDY's, L.J., judgment in *Travers v. Cooper*. A lighterman, how-

ever, is a common carrier, and must therefore use stronger words: see the next case.

In re Polemis and Furness Withy & Co., [1921] 3 K. B. 560, the servants of the charterers of a vessel were guilty of negligence, as a result of which the vessel got on fire, and it was held that the charterers were not protected from liability by an exception of "the act of God, the King's enemies, loss or damage from fire." But in that case the Court appears to have been influenced by the fact that ship-owners, being common carriers, would not have been protected under that clause in the case of fire, and that accordingly charterers could not be held to be protected. In the above case of *Turner v. Civil Service Supply Association, Ltd.*, however, SANKEY, J., was of opinion that the condition as to fire would have no meaning if it did not apply to a fire caused by negligence.

CONSIGNOR'S OBLIGATIONS

BAMFIELD v. GOOLE AND SHEFFIELD TRANSPORT CO., LTD.,

[1910] 2 K. B. 94

When goods are delivered for carriage to a common carrier there is an implied warranty by the consignor that the goods are fit to be carried in the ordinary way, unless the carrier knows or ought to know that the goods are dangerous.

Facts of the Case

The plaintiff's husband was the owner of a keel, and carried on business as a common carrier, the plaintiff assisting him. The defendants, who were carriers and forwarding agents, delivered to the plaintiff's husband, for carriage by canal from Goole to Sheffield in his keel, a quantity of a chemical known as "ferro-silicon," packed in casks. It was described as "general cargo," and the defendants did not inform the plaintiff's husband that it was ferro-silicon, although they themselves were aware of that fact.

During the journey from Goole to Sheffield the ferro-silicon gave off poisonous gases, and in consequence thereof the plaintiff's husband died, and the plaintiff, who was on board the keel with him, was rendered seriously ill.

The plaintiff sued the defendants for damages, in respect both of her husband's death and also her own illness. At the trial,

WALTON, J., found, on the evidence, that though most ferro-silicon did not give off dangerous gases, yet some did so under ordinary conditions of carriage, and therefore it was liable to be dangerous and in that sense a dangerous substance. He also found that the plaintiff's husband did not know that the goods delivered to him by the defendants were dangerous, and that though the defendants knew the nature of the goods, they did not know that ferro-silicon was dangerous.

Decision

The **Court of Appeal** held that there was an implied undertaking by the defendants that the goods were such as might safely be carried, and not of a dangerous nature, and gave judgment for the plaintiff under both heads of her claim.

In the course of his judgment, FARWELL, L.J., said:—

"A duty to disclose is one thing, and a warranty of safety is another; for there can be no duty to disclose a fact that the consignor neither knows nor ought to have known, and an action founded on the failure to perform such a duty must allege and prove scienter, and differs in that respect from an action on warranty like the present. But, although it is true that in all the cases cited to us the consignors either knew or ought to have known of the danger, the principle on which the judgments rest is the common law obligation of the carrier to carry according to his profession, and the correlative obligation of the consignor to tender for carriage such goods only as can be safely carried. In my opinion every consignor who tenders goods to a common carrier, to be carried by him in performance of his common law obligation to carry, thereby impliedly warrants to the carrier that the goods so tendered are fit to be carried in the ordinary way and are not dangerous."

NOTES

It was explained in *Great Northern Rail. Co. v. L.E.P. Transport and Depository, Ltd.*, [1922] 2 K. B. 742, that the consignor's warranty that the goods can safely be carried applies whether he delivers them to a common or a private carrier. In that case the defendants delivered to the plaintiffs carboys containing corrosive fluid for carriage from Tilbury to Luton, and the defendants carried them in a van together with felt goods belonging to another consignor. The defendants had described the fluid by its common name abroad, but in England this name denoted a harmless substance. In the absence of proper vent holes gas developing in the carboys forced the stoppers out, and the liquid damaged the felt goods. The plaintiffs, who were common carriers of the felt goods—but not of the carboys because railways do

not profess to carry dangerous goods in that capacity—paid damages to the felt good owners, and now sued the defendants to recoup themselves for that expenditure. The Court of Appeal allowed the action, since the defendants, as consignors, had impliedly warranted that the carboys were fit to be carried and had broken the warranty. ATKIN, L.J., said at p. 776:—

“ In respect of goods not known by carriers to be dangerous there is a warranty that the goods are such as may be safely carried and are not dangerous. That warranty applies in the case of carriers who are under a duty to carry, whether the duty is imposed upon them by the common law by virtue of their profession as common carriers, or whether it is imposed upon them by Statute, as it is in this case by section 2 of the Railway and Canal Traffic Act, 1854. In the latter case the duty is at least as large as that which is imposed upon a person who tenders goods for carriage on a general ship, which is the foundation of the warranty in *Brass v. Maitland* (1856), 6 E. & B. 470.”

The *Bamfield Case* was also applied in *Burley, (C.), Ltd. v. Stepney Corporation*, [1947] 1 All E. R. 507. The plaintiffs had agreed to remove the defendants' refuse in barges. One load contained a dangerous substance and caused damage. The defendants would have been liable but for a clause in the special contract which protected them against this type of action.

Where railway companies are engaged the law is now laid down in Standard Terms and Conditions A 20, which reads:—

“ In the absence of written notice to the contrary given to the Company at the time of delivery to them, all merchandise is warranted by the sender to be fit to be carried or stored in the condition in which it is handed to the Company, and not to be merchandise included in the Dangerous Goods Classification or unclassified merchandise of a kindred nature.”

This principle also applies where a consignor puts cargo on board a ship to be carried to a country to which cargo cannot be taken without permission or licence. In such a case, if the consignor does not obtain the necessary permission, he will be liable to the shipowner for damages for delay caused by the detention of the ship. (See *Mitchell Cotts & Co. v. Steel Bros. & Co., Ltd.* (1916), 22 Com. Cas. 63.)

THE RAILWAY AND CANAL TRAFFIC ACT, 1854

PEEK v. NORTH STAFFORDSHIRE RAIL. CO.

(1863), 10 H. L. Cas. 473

A special contract by a railway company relieving itself of liability for the neglect or defaults of its servants will only be valid if found by the Court to be just and reasonable in the circumstances.

Facts of the Case

The plaintiff intended to send three marble mantelpieces to London on the defendant railway. A printed notice was delivered to him intimating that goods were only carried subject, among other matters, to the condition that liability for loss or damage was excluded unless declared and insured at a premium of 10 per cent. After lengthy negotiations the plaintiff wrote to the defendants : "Please forward the three cases of marbles, not insured." This statement he signed. The goods were damaged, and the defendants relied on the notice in conjunction with the plaintiff's letter.

Decision

It was held by the **House of Lords** that the document in question did not constitute a contract in writing containing the conditions and signed by the plaintiff, within the meaning of s. 7, of the Railway and Canal Traffic Act, 1854. Besides the condition was unreasonable and therefore void under the section.

BLACKBURN, J., said, at p. 511 :—

"A condition exempting the carriers wholly from liability for the neglect and default of their servants is *prima facie* unreasonable. I do not go so far as to say that it is necessarily in every case unreasonable and void. A carrier is bound to carry for a reasonable remuneration, and if he offers to do so, but at the same time offers in the alternative to carry on the terms that he shall have no liability at all, and holds forth as an inducement a reduction of the price below that which would be reasonable remuneration for carrying at carriers' risk, or some additional advantage, which he is not bound to give, and does not give, to those that employ him with a common law liability, I think a condition thus offered may be reasonable enough. For the terms of a special contract entered into by a person who has the option

of employing the carrier on the terms of the contract, or on the terms of his undertaking the common law liability, are necessarily reasonable as regards the person having the option."

The learned judge went on to hold that the proposed 10 per cent. addition for insurance amounted to an unreasonable freightage rate, and therefore avoided the contract.

NOTES

The student should note that s. 7 of the 1854 Act was aimed at contracts exempting the companies from liability for the neglects and defaults of their servants, not for excluding other parts of their common law liability.

Out of this decision and those based on it there developed the practice of railway companies offering two alternatives to the consignor; (i) carriage at company's risk at full rate, which being fixed by a statutory tribunal will be presumed to be "reasonable" and (ii) carriage at owner's risk at a lower rate.

Peek's case and s. 7, of the 1854 Act, still govern the carriage of passengers' luggage as well as that of merchandise under a written contract made in accordance with s. 44 (3) of the Railways Act, 1921.

In all other cases the Standard Terms and Conditions, 1927, promulgated under the Railways Act, 1921, apply, and these provide for the two alternative company's risk and owner's risk consignment notes as well as a number of other special forms of contract. Thus the fair alternative required by *Peek's* case has now found statutory recognition.

The more important of the company's risk conditions have been explained *supra*, p. 262. Where the consignor chooses to have his goods carried at the cheaper rate at owners' risk the company's liability is considerably reduced. Subject to the proviso mentioned below under Condition B 3 the company incurs no liability unless the consignor proves "wilful misconduct of the Company or their servants." Thus where a railway employee contrary to company regulations failed to pass bulky goods under a gauge the Court held that this was "wilful misconduct." (See *Bastable v. North British Rail. Co.*, [1912] S. C. 555.) But "wilful misconduct" was negatived in *Forder v. Great Western Railway*, [1905] 2 K. B. 532. There, sheepskins were carried on a bedding of wood chips which became entangled in the wool. The consignor complained, but did not sue. Later, another consignment of his was damaged in the same way. Since, however, the plaintiff could not prove that the second loader knew of his earlier complaint his conduct was not considered to amount to "wilful misconduct."

Condition B 3 contains the following important proviso:—

"Provided that nothing in this condition shall exempt the Company from any liability they might otherwise incur in the following cases:—

(a) Non-delivery of the whole of a consignment or of any separate package forming part of the consignment, properly packed, and addressed in accordance with Condition 1 hereof, unless such non-delivery is due to accidents to trains or to fire.

(b) Pilferage from packages of merchandise protected otherwise than by paper or other packing readily removable by hand, provided the pilferage is pointed out to a servant of the Company on or before delivery.

(c) Misdelivery where merchandise addressed in accordance with Condition 1 hereof is not tendered to or placed at the disposal of the consignee within 28 days, or in the case of perishable merchandise within a reasonable time which shall not be less than 72 hours after receipt of the consignment by the Company to whom the same was handed by the sender.

Provided, however, that the Company shall not be liable in the said cases of non-delivery, pilferage or misdelivery upon proof by them that the same has not been caused by the negligence or misconduct of the Company or their servants."

Special provisions apply to the carriage by common carriers of valuables. Where the carriage is by road the original version of the Carriers Act, 1830, applies, and where it is by rail the same Act as amended by s. 56 and Schedule VI, of the Railways Act, 1921. It provides in s. 1 that a common carrier by land shall not be liable for certain valuables exceeding in road carriage £10 and in rail carriage £25, unless at the time of delivery the consignor declares value and nature of the goods and pays an increased charge if required to do so. But under s. 8 the carrier loses this exemption if loss or damage arises "from the felonious acts of any servant" of the carrier. The servant is always liable for "his own personal neglect or misconduct."

It is for the owner of the goods to prove the felonious act, and he cannot discharge this burden by showing merely that a felonious act was committed. As MELLOR, J., said in *McQueen v. Great Western Railway* (1875), L. R. 10 Q. B. Cases 569, this would afford no protection to carriers. The owner must prove the commission of the felonious act by a carrier's servant. The plaintiff "must do more than show that the goods have been lost by a felony having been committed, he must show by reasonable evidence, so as to raise a *prima facie* case, that the goods were stolen by the company's servants." On the other hand the plaintiff need not identify a particular servant as the one who committed the felony. (*Vaughton v. London and North Western Rail. Co.* (1875), L. R. 9 Ex. 93.) The extent of the burden of proof was well illustrated in *Smith (H. C.), Ltd. v. Midland Rail. Co.* (1919), 88 L. J. K. B. 868. Goods were stolen while in the defendant's charge, and the plaintiffs proved that the thief must have spent some considerable time in opening and repacking the parcel. Only the defendants' servants could have done this; no one else could have remained unnoticed so long. Thus

theft by the company's servant was proved, and the plaintiffs recovered.

Where, however, as in the case of an ordinary bill of lading contract, carriers are not liable for loss caused by certain specified risks, it is for them to show that a loss is due to a particular risk. (See *The Xantho* (1887), 12 App. Cas. 503, *infra*, p. 285.)

DELIVERY TO CONSIGNEE

M'KEAN v. M'IVOR (1870), L. R. 6 Ex. 36

If the carrier delivers goods to the wrong person he will be liable if he departed from the ordinary course of business.

Facts of the Case

The plaintiffs were flour merchants at Manchester. Their Glasgow agent wrote to them that he had an order from C. Tait & Co., 71, George Street, Glasgow. This firm did not exist, but the plaintiffs' agent had made arrangements to receive letters addressed to Tait & Co. at that address. On receiving the order the plaintiffs instructed the defendants, carriers by water between Liverpool and Glasgow, to deliver the goods to Tait & Co. as consignees. As was usual the defendants wrote to the consignee that the goods had arrived and informed him that the notice must be produced on collection and the delivery order endorsed. The plaintiffs' agent indorsed the latter "Tait & Co." and ordered the goods to be delivered to John Thorn, a respectable trader to whom he had sold the goods. These were delivered according to instruction. Two similar transactions took place, and in each case the agent kept the money. The plaintiffs sued the defendants for the value of the goods, contending that by acting as they had done they had converted the goods.

Decision

The Court of Exchequer held that the action failed. MARTIN, B., said:—

"The defendants have done exactly what they were directed to do. . . . When the plaintiffs thought fit to act upon the order which (their agent) had given them in the false name of C. Tait & Co., and gave directions to the defendants to deliver goods to

Tait & Co. at 71, George Street, Glasgow. I think they affirmed that there were such persons as C. Tait & Co. at that place . . . and the carriers had the right to assume that this statement was correct, and have a right now to say that the person to whom they delivered the goods was, as he was in fact, the person who presented himself to the plaintiffs as C. Tait & Co. But if the carrier delivers at the place indicated, or does what is equivalent to a delivery there, he does all that he is bound to do: he obeys the sender's directions, and is guilty of no wrong. To make him liable there must be some fault; it is a question of fact whether there has been any such negligence as makes him guilty of a conversion; and where he has carried out the directions of the sender, the mere fact that he has delivered the goods to some person to whom the sender did not intend delivery to be made is not sufficient to support the allegation that he has converted them."

CANNELL, B., said:—

"There has been no such misdelivery as amounts to a conversion. The plaintiffs are, as it were, estopped from saying that there were no such persons as C. Tait & Co."

NOTES

In the above case the action was based on conversion. This is a wrongful act, or tort. To succeed the plaintiff must show that the defendant converted the plaintiff's goods or money to his own use. Originally—and in theory still—the defendant's liability is absolute; that is to say, the plaintiff need not prove that the defendant intended to convert, or that he acted negligently in handling, what belonged to the plaintiff. Where, however, the plaintiff alleges wrong delivery by a carrier he contends that the defendant handed the goods to a person other than the consignee. In other words, the plaintiff must prove that the person to whom the carrier delivered was not the proper consignee. This, in turn, is determined by the usual course of business, and introduces the conception of negligence. For whether a person is the proper consignee must be judged from the point of view of the carrier at the time of delivery. So the question which the Court must decide when trying actions of this kind is: was the defendant entitled to regard the person to whom he delivered as the proper consignee or has he negligently departed from the usual course of business?

In *M'Kean v. M'Ivor* the Court held that the goods were delivered to the proper consignee, and the same applied in *Heugh v. London and North Western Rail. Co.* (1870), L. R. 5 Ex. 51, where the carriers on finding the addressee's premises to let posted a notice of arrival to him which got into the hands of a swindler who signed the delivery order in the name of the addressee and obtained delivery. It was held that the carriers had not been negligent, but had acted in the ordinary course of their business.

On the other hand, in *Stephenson v. Hart* (1828), 4 Bing. 476, the plaintiff was induced by fraud to send goods to an address in London. The carrier found the house uninhabited, but later received a letter from St. Albans, signed in the name of the consignee, requesting him to send the goods to a public house there. This the carrier did. On being sued the Court found him liable. The circumstances should have aroused his suspicion.

PASSENGERS' LUGGAGE

VOSPER v. GREAT WESTERN RAIL. CO.,
[1928] 1 K. B. 340

Railway companies are common carriers of passengers' luggage.

Facts of the Case

The plaintiff took a third-class week-end return ticket from Exeter to London on the defendants' line, intending to travel by the 1.45 train, which was a non-stop train from Exeter to London. A porter in uniform carried his luggage, consisting of a suit case, bowler hat, and cap, to the platform and put it in the train. The plaintiff said he saw the porter put the suit case in the luggage-van, and that he himself put his hat, coat and stick in a third-class compartment. The porter said that on the plaintiff's instructions he put the suit case on the seat in a first-class compartment and put the hat on the rack. Another porter who was near, gave the same evidence and the County Court Judge found that the story told by the porter was correct.

The plaintiff said he did not travel in the compartment where his hat, coat and stick were, because he went to the restaurant-car on the train, and had lunch there, then he joined some friends who were in one of the Exeter coaches on the train, and stayed with them there until tea-time, and then went back to the restaurant-car for tea, and then joined his friends again in their compartment, where he remained to the end of the journey.

When the train arrived at Paddington Station, London, the suit case could not be found and no trace of it had since been seen. The plaintiff sued the defendants, and the County Court Judge found that at the commencement of the journey the suit case was in the immediate control of the plaintiff as stated by the porter, but that the defendants remained under the duty of common carriers unless the loss was due to the plaintiff's

negligence, that the onus of proving this was on the defendants, and that as in this case the loss might have happened while the plaintiff was properly and reasonably taking lunch or tea in the restaurant-car, it could not be said to have been due to his negligence, and therefore the defendants were liable, and he gave judgment for the plaintiff for £51. The defendants appealed.

Decision

It was held by ATKIN, L.J., and LAWRENCE, L.J., sitting as a **Divisional Court**, that the decision of the County Court Judge was right.

In the course of his judgment, ATKIN, L.J., said :—

“ It is plain to my mind that it has been well established that railway companies are common carriers of passengers' luggage, whether it be luggage which is labelled and put in the luggage van, or hand luggage which is taken by the passenger and not put into the van, but that in respect of the hand luggage that is not put in the van there is this modification of their ordinary liability, that they are not liable as common carriers if they can show that the loss occurred by reason of the negligence of the passenger in failing to take proper care of that luggage. The authority for that proposition appears to me to be the case of *Great Western Rail. Co. v. Bunch* (1888), 13 App. Cas. 31. . . . Mr. Barrington-Ward, in accepting the view of the law as there stated . . . laid stress upon the words 'in the carriage with the passenger himself,' and suggested that it is an essential condition of the liability of common carriers by rail under the contract that the luggage" (that is to say as regards luggage taken by a passenger into the carriage with him) "should be in the carriage with the passenger. It appears to me, however, to be impossible to confine the doctrine within those narrow limits. . . . When luggage which a passenger keeps under his control is lost, the question whether or not he has been guilty of a lack of care which caused the loss is of course a question of fact . . . the onus of proving the lack of care being on the railway company. I can well imagine that a Judge might hold that the onus was discharged if he found that the passenger on a long journey had left his luggage in a place where there were many other passengers about, paying no attention to it and travelling in a different carriage. The question, as I have said, is a pure question of fact. In this case the County Court Judge has found that the onus on the defendants has not been discharged. For these reasons it appears to me that the careful judgment of the learned Judge is correct in law, and therefore that the appeal should be dismissed with costs.”

NOTES

In the case of *Great Western Rail. Co. v. Bunch* (1888), 13 App. Cas. 31, Mrs. Bunch arrived at Paddington Station at 4.20 p.m. on Christmas Eve with a bag and two other articles of luggage, to travel by the 5 p.m. train. A porter labelled the two articles and took all the luggage to the platform, the train not then having come in. Mrs. Bunch told the porter she wished to have the bag put in the carriage with her. She then left all the luggage with the porter and went to meet her husband to get her ticket. Ten minutes later she and her husband returned to the platform. They found the two labelled articles had been put into the luggage van of the train, but that the porter and the bag had disappeared. It was held that the time when the luggage was entrusted to the porter was a reasonable and proper time before the departure of the train, and that the railway company were liable for the loss of the bag.

On the other hand, in *Talley v. Great Western Rail. Co.* (1870), L. R. 6 C. P. 44, Talley was travelling from Cheltenham to Reading in a first-class compartment, and at his request his portmanteau was placed in the carriage with him. He got out at Swindon, an intermediate station, to go to the refreshment-room, and on his return could not find his carriage, which, with all the first-class carriages, had been shunted on to the main line as was usual. He alleged that the guard told him his carriage was not going on, and that his luggage had been put in the van. The guard denied this, and said he pointed out T.'s carriage to him. Eventually, T. got into another carriage and went on to Reading. The first-class carriages then went on by the same train to London, and T.'s portmanteau was there discovered, but it had been cut open and a portion of the contents stolen. In an action by T. the jury found, (*inter alia*) that T., by his own negligence, contributed to the loss of the portmanteau, and it was held by the Court of Common Pleas, on appeal, that the defendants were not liable.

Shipowners are under the same liability for passengers' luggage as railway companies. (See *Jenkyns v. Southampton, etc., Steam Packet Co. Ltd.*, [1919] 2 K. B. 135.)

SPECIAL CONTRACTS

THOMPSON v. LONDON, MIDLAND AND SCOTTISH RAIL. CO.,
[1930] 1 K. B. 41

Reasonable notice of conditions on a ticket or other printed contract of carriage.

The facts and decision of this case have been fully set out on p. 24, *supra*, and reference should be made to that page.

Attention is again drawn to the matter at this stage because of the very important part which this type of contract plays in the laws of carriage. In contracts of carriage with public carriers, whether of passengers or goods, it is most unusual for there to be any bargaining about the terms on which the carriage takes place. The carrier has standard terms which are adopted in every case and the other party seldom examines them; this is particularly so in cases of carriage by railway. The other party to the contract is nevertheless bound by them, as the cases illustrated above show, provided he was either aware of their existence, or the carrier took adequate steps to bring the fact of their existence to his attention.

CARRIAGE BY SEA AND CHARTERPARTIES

(1) **SANDEMAN v. SCURR**

(1866), L. R. 2 Q. B. Cases 86

(2) **THE BAUMWOLL MANUFACTUR VON CARL SCHEIBLER v. FURNESS,**

[1893] A. C. 8

The distinction between a charterparty in the ordinary form and a charterparty by demise, and its importance.

Facts of the First Case

In October, 1863, a ship was chartered by one Hodgson from the owners. The ship proceeded with a cargo of coal to Oporto and the master handed the ship over to Coverley & Co., who were the agents of the charterer, Hodgson, and they put it up as a general ship.

The plaintiffs' agent at Oporto shipped ten pipes of port wine for London under a bill of lading, which was signed by the master of the ship at the office of Coverley & Co. and was indorsed by Coverley himself. The whole cargo on the ship was stowed by a stevedore appointed and paid by Coverley & Co., but later the cost of stowage was paid by the master, who was a part-owner of the ship, and he also paid the crew. The casks of wine shipped by the plaintiffs' agent were in good order when shipped, but on arrival in London one cask was leaking. The plaintiffs alleged this was due to bad stowing, but the defendants contended it was caused by stress of weather.

The plaintiffs sued the shipowners for the damage, but they contended that they were not liable for the damage sustained by the plaintiffs, however caused. The jury found that the actual damage was caused by improper stowage and judgment was given for the plaintiffs. The defendants appealed on the ground that as the ship had been chartered by Hodgson the contract to stow and carry the goods was not made with them and they were not liable.

Decision in the First Case

It was held by the **Court of Queen's Bench** that the charter-party did not amount to a demise of the ship, and the owners still remained in possession by their servants, the master and the crew, and therefore they were liable to the plaintiffs.

In delivering the judgment of the Court, COCKBURN, C.J., said :—

“ The result of the authorities . . . is to establish the position, that in construing a charterparty with reference to the liability of the owners of the chartered ship, it is necessary to look to the charterparty, to see whether it operates as a demise of the ship itself, to which the services of the master and crew may or may not be superadded, or whether all that the charterer acquires by the terms of the instrument is the right to have his goods conveyed by the particular vessel, and as subsidiary thereto, to have the use of the vessel and the services of the master and crew. In the first case, the charterer becomes for the time the owner of the vessel, the master and crew become to all intents and purposes his servants, and through them the possession of the ship is in him. In the second, notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the vessel, the ownership remains in the original owners, and through the master and the crew, who continue to be their servants, the possession of the ship also. . . . It appears to us clear that the charterparty in the present instance falls under the second of the two classes referred to. There is here no demise of the ship itself, either express or implied. It amounts to no more than a grant to the charterer of the right to have his cargo brought home in the ship, while the ship itself continues, through the master and crew, in the possession of the owners, the master and crew remaining their servants.”

Facts of the Second Case

Furness was the owner of a ship, and Gillchrest & Co. agreed to purchase it from him at a price payable by instalments after the expiration of a charterparty made at the same time. By the

charterparty, Furness agreed to let the ship for four months to a steamship company for whom G. & Co. were acting as agents. The charterparty provided (*inter alia*) that the charterers should provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew, but that the owner should pay for the insurance on the vessel, and maintain her in an efficient state in hull and machinery for the service. The charterers were to provide and pay for all coal, fuel, port charges, and other charges whatsoever except those before mentioned. The charterparty also provided that the captain should be under the orders and direction of the charterers and that the charterers should indemnify the owners from all consequences or liabilities that might arise from the captain signing bills of lading or in otherwise complying with the same, but that the owner was to have the option of appointing the chief engineer, to be paid by the charterers.

G. & Co. took possession of the ship and appointed the master, officers, and crew, except the chief engineer who was appointed by Furness in exercise of his option. All the wages were paid by G. & Co. They sent the ship to New Orleans, and there cotton was shipped by the appellants for Bremen, under bills of lading, some of which were signed by G. & Co.'s agents, and some by the master. The bills of lading contained no reference to the charterparty, and the shippers had no notice of its terms.

During the voyage from New Orleans the ship foundered and the cotton was lost, owing, as was alleged, to unseaworthiness. The appellants brought an action against G. & Co. and Furness for the loss of the cotton, and it was agreed that (assuming the loss to have been caused by unseaworthiness) the question whether Furness and G. & Co., or either of them, were liable to the appellants should be tried before any other question. At the trial Furness alone defended the action, G. & Co. not being represented. CHARLES, J., found that Furness was liable to the appellants, but this decision was reversed by the **Court of Appeal**, who entered judgment for Furness. The appellants then appealed to the **House of Lords**.

Decision in the Second Case

The **House of Lords** held that Furness was not liable and affirmed the judgment of the **Court of Appeal**.

In his judgment, Lord WATSON said :—

“ At the time when the bills of lading were signed and also at the time when the goods of the appellants suffered damage,

the ship was in the possession and under the control of the charterers, who employed their own master and crew in her navigation. That point once fixed, it appears to me that there is really no substantial question which can arise upon this appeal. . . . The master who signed the bill of lading was the servant and agent of the charterers and not the servant and agent of respondent, Furness. In that state of facts, the appellants, in order to succeed here, must establish that the present case forms an exception from the general rule that a man is not liable upon contracts made by persons who are neither his agents nor his servants. They argued that the respondent remains liable for contracts made by the charterers' agent with shippers who had no notice of the terms of the charter. For that proposition no authority whatever was produced. . . . No doubt, when a shipowner who enters into a charterparty without parting with the possession and control of his ship seeks to limit the powers assigned by law to his captain, the limitation will be altogether ineffectual in any question with shippers who are ignorant of the terms of the instrument. . . . But I know of no principle or authority which requires that notice must be given when an owner parts, even temporarily, with the possession and control of his ship, in order to prevent the servant of the charterer from pledging his credit."

NOTES

Since a charterparty by demise transfers the management of the ship to the charterer it will not be used by a shipper of goods who is solely concerned with getting them transported. Such a person is normally a merchant or manufacturer who does not understand the management of ships. In these cases an ordinary form of charter-party will be used.

The problem of deciding whether a particular form of charter is by demise or not is most likely to arise when the charterer is himself a shipowner or at any rate intends to use the vessel for the purpose of making a profit out of the use of the ship, and the owner, when parting with the possession of it over a substantial period desires to safeguard his interests by retaining control over the officers, insurance, etc. In such cases it may be difficult for third parties claiming for damage done by the ship during the period of the charter to know whether to bring their proceedings against the shipowner or the charterer.

THE BILL OF LADING

LICKBARROW *v.* MASON

(1793), 1 Smith L. C. 13th ed. 703, 731

Negotiable character of the bill of lading.

Facts of the Case

On July 22nd, 1786, Turing and Son, of Middlebourg, consigned goods to Liverpool on account of Freeman, the captain of the ship, signing bills of lading in quadruplicate. Two of the bills Turing and Son indorsed in blank and sent them to Freeman together with the invoice; one was retained by the captain and one by Turing, the consignors. On July 25th Freeman sent his two bills and the invoice to the plaintiffs, who paid for the goods. On August 15th, Freeman, before he had paid the price of the goods to Turing became bankrupt. Thereupon, on August 21st, Turing indorsed the bill of lading which they had retained to the defendant, so that he might get back the goods, and he, on the arrival of the ship at Liverpool on August 28th, presented the bill to the captain, and the latter delivered the goods to him. The plaintiff later demanded the goods from the defendant, offering to pay freight and other charges in respect of them, but the defendant refused to deliver them. He contended in effect that he stood in the shoes of the original sellers, Turing and Son, and that they had exercised the seller's right to stop the goods *in transitu*, which they had become entitled to by reason of Freeman's, the original buyer's and consignee's, bankruptcy.

Decision

It was held by the **House of Lords** that the property in goods passes with the transfer of the bill of lading issued in respect of them; further, that while up to delivery of the goods to the consignee the consignor is entitled to stop them *in transitu* in the event of the consignee becoming insolvent without having paid the price, this right of stoppage is lost if the consignee has assigned the bill of lading to a *bona fide* holder for valuable consideration. This was the case here, since the plaintiff had paid the price to Freeman, the consignee, and the defendant was therefore liable to hand over the goods to the plaintiff.

In the course of his judgment BULLER, J., said, at pp. 733 *et seq.* :—

“ This brings me to the two great questions in the cause, which are undoubtedly of as much importance to trade as any questions which ever can arise. The first is, whether at law the property of goods at sea passes by the indorsement of a bill of lading? The second, whether the defendant, who stands in the place of the original owner, had a right to stop the goods *in transitu*? And, as to the first, every authority which can be adduced from the earliest period of time down to the present hour agrees that at law the property does pass as absolutely and as effectually as if the goods had been actually delivered into the hands of the consignee.”

And, at p. 738, the learned judge continued :—

“ But the second question made in the case is, that, however the legal property be decided, the defendants, who stand in the place of the original owner, had a right to stop the goods *in transitu*, and have a lien for the original price of them.”

After having reviewed the authorities the learned judge concludes, at p. 745 :—

“ After these authorities, taking into consideration also that there is no case whatever in which it has been holden that goods can be stopped *in transitu* after they have been sold and paid for, or money advanced upon them, *bona fide* and without notice, I do not conceive that the case is open to any arguments of policy or convenience; but if it should be thought so, I beg leave to say that in all mercantile transactions, one great point to be kept uniformly in view, is to make the circulation and negotiation of property as quick, as easy, and as certain as possible.”

Property must be capable of being negotiated while at sea so that it should not be locked up during the period of transport.

“ Turing has transferred the property to Freeman, in order that he might transfer it again, and has given him credit for the value of the goods. Freeman having transferred the goods again for value, I am of opinion that Turing had neither property, then, nor a right to seize *in transitu*. . . . (p. 748). To sum up the whole in very few words: the legal property was in the plaintiff: the right of seizing *in transitu* is founded on equity. No case in equity has ever suffered a man to seize goods in opposition to one who has obtained a legal title, and has advanced money upon them.”

NOTES

With regard to stoppage *in transitu* reference should also be made to *Bethell v. Clark*, illustrated *supra*, p. 195, and also to *Cahn v. Pockett S.S. Coy.*, p. 189.

The bill of lading, which is certainly the most remarkable document, from a legal point of view, which commerce has ever produced, fulfils three functions:—

(i) It is the document which sets out the terms of a contract of carriage with a common carrier by sea, *i.e.*, the owner of a ship put up to carry general merchandise as opposed to the type of shipowner who charters out his ship.

(ii) It is a receipt for the goods loaded on board the ship.

(iii) It is a document of title to the goods the transfer of which from one person to another may under suitable conditions transfer the property in the goods. It thus resembles a negotiable instrument; though it is not fully negotiable. It is this third characteristic of the bill of lading which gives it its tremendous commercial significance, and it is for this reason that we have chosen to illustrate it with a leading case, though the other aspects are referred to in these notes. See also Stevens' Elements of Mercantile Law, 11th Edn., pp. 485 *et seq.*

The last-mentioned aspect was well explained by BOWEN, L.J., in *Sanders v. Maclean* (1883), 10 Q. B. D. 327, 341:—

“ The law as to the indorsement of bills of lading is as clear as in my opinion the practice of all European merchants is thoroughly understood. A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During the period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operate as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to someone rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.”

The issue of bills of lading in a set may give rise to difficulty. In *Glyn, Mills & Co. v. East and West India Dock Co.* (1882), 7 App. Cas. 591, bills of lading were issued in a set of three, and two of them sent to the consignee, who pledged the first with the plaintiff bankers as security for a loan. The goods were later deposited in the defendants' warehouse, where the consignee claimed them by presenting the second bill. The goods were handed to him, and the plaintiffs sued for damages, but the action was dismissed, since the defendants had delivered the goods *bona fide* and without knowledge of the transfer of the first bill of lading. Pledgees of such documents safeguard themselves against the effect of this decision by insisting on obtaining the complete set of bills.

As we have seen, the bill of lading is evidence of the contract of affreightment between the shipper and the shipowner, and by virtue of the Bills of Lading Act, 1855, the consignee to whom the bill is indorsed becomes not only the owner of the property in the goods, but also the assignee of the bill of lading contract, so that he may become liable to pay freight, demurrage or other charges. However, in a case where a bill of lading was indorsed to a banker as security for a loan it was held that such indorsee, who did not acquire the general property in it, was not liable for freight: *Sewell v. Burdick* (1884), 10 App. Cas. 74. But as soon as the banker takes possession of the goods in order to enforce the security he becomes liable to pay all charges, and also entitled to all rights under a bill of lading contract: *Brandt v. Liverpool, Brazil, and Plate Steam Navigation Co.*, [1924] 1 K. B. 575.

Apart from being evidence of the contract between shipper and shipowner, the bill of lading is also a receipt of the goods, and this was indeed its original purpose. The shipowner must take great care in checking the goods and their condition before giving this receipt; for if the goods are later delivered in a damaged condition and the bill of lading was a so-called "clean" bill of lading, that is one indicating no shortage or bad condition of the goods, such clean bill will be evidence that the goods were damaged while in the shipowner's possession. Any qualifications of quantity or quality of the goods must be sufficiently precise to displace this *prima facie* evidence rule. This was well illustrated in *The Skarp*, [1935] P. 134. In that case there was a short delivery of timber under two bills of lading. One of them was marked by the master "494 pieces of these lots not on board, being included in specification as being part of scow No. 5 lost from ship." The other was marked: "Being our order No. 11 and not on board of ship, being lost from scow No. 5 during storm alongside." It was held that only in the second case did the bill clearly convey that the goods had not been shipped so that on the first one the shipowner had to pay damages for short delivery.

HAMILTON FRASER & CO. v. PANDORF & CO.
 (1887), 12 App. Cas. 518

*Exception clauses in a charterparty or bill of lading.
 Doctrine of proximate cause.*

Facts of the Case

The respondents, P. & Co., shipped rice on board the appellants' vessel, the *Inchrhona*, during a voyage from Akyab to Bremerhaven. It was shipped under a charterparty and bills of lading which contained certain exceptions as to the liability of the appellants, including "dangers and accidents of the seas."

During the voyage, rats gnawed a hole in a pipe which connected the bathroom with the sea, with the result that sea water got through this hole and damaged the rice. The respondents sued for the damage, but the appellants relied on the above exception, contending that the proximate cause of the damage was a peril of the sea, namely the entry of sea-water, and that they were protected.

Decision

On appeal it was held by the **House of Lords** that the appellants were protected by the above exception.

Lord WATSON said, at p. 525:—

"When a cargo of rice is directly injured by rats, or by the crew of the vessel, the sea has no share in producing the damage, which in that case, is wholly due to a risk not peculiar to the sea, but incidental to the keeping of that class of goods, whether on shore or on board of a voyaging ship. But in the case where rats make a hole, or where one of the crew leaves a port-hole open, through which the sea enters and injures the cargo, the sea is the immediate cause of mischief, and it would afford no answer to the claim (for damages) to say that, had ordinary precaution been taken to keep down vermin, or had careful hands been employed, the sea would not have been admitted and there would have been no consequent damage."

The principles are the same in insurance and carriage,

"but there is this difference between them, that when a ship-owner, who is bound by the implied terms of his contract, to carry with ordinary care, claims the benefit of the exception, the Courts will, if necessary, go behind the proximate cause of damage, for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the shipowner or of those for which he is responsible."

But in the present case no negligence was proved, and the shipowners were protected.

NOTES

In the case of *The Xantho* (1887), 12 App. Cas. 503, it was held by the House of Lords that the above exception also covered foundering caused by collision with another vessel if it occurred without the fault of the shipowner carrying the cargo in question.

DEVIATION

JAMES MORRISON & CO. LTD. v. SHAW, SAVILL AND ALBION CO., LTD.,

[1916] 2 K. B. 783

The effect of deviation by a ship from the named voyage upon exceptions to the liability of the shipowners.

Facts of the Case

At Napier, New Zealand, 158 bales of wool were shipped in the defendants' steamship *Tokomaru*, for carriage to London, under two bills of lading of which the plaintiffs were the indorsees and holders. Both the bills were in the same form and were dated November 19th, 1914. In the margin were the words "Direct service between New Zealand and London," and the bills were headed "Steam from New Zealand to London." The bills stated (*inter alia*) that the goods were shipped on board the steamship in question bound for London, with liberty to proceed to and stay at any port or ports, place or places in New Zealand, and with liberty on the way to London to call and stay at any intermediate port or ports, to discharge or take on board passengers, cargo, coal, or other supplies, with permission, if desired, for the vessel to call at Rio de Janeiro or Monte Video or La Plata, for the purpose of taking on board coal, supplies, cargo, or livestock. Clause 1 of the exceptions and conditions excepted the act of God and the King's enemies.

The *Tokomaru* was a cargo vessel, and the usual and well-known route for steamers of this line from New Zealand to London, which was substantially followed, was by Cape Horn to Monte Video, or one of the other two named ports, thence to Teneriffe or Madeira, and thence direct to London, the mail steamers only calling at Plymouth to land mails and passengers.

After the bales of wool had been shipped the defendants took on board a parcel of frozen meat for carriage to France. The master received instructions at Teneriffe, where the ship called, to proceed to Havre to deliver the meat. The vessel accordingly proceeded to Havre, and on January 30th, 1915, when she was about seven or eight miles from the port, she was torpedoed by a German submarine and the cargo was totally lost.

The plaintiffs claimed the value of the bales of wool, and the defendants relied upon the exception as to the King's enemies, but the plaintiffs contended that the defendants were not entitled to rely on this exception, because the ship was deviating from the direct voyage to London by proceeding to Havre. It appeared that the course from Teneriffe, whether to Havre or to London direct, was the same up to a certain point, but that the courses then diverged and that by proceeding to Havre the length of the voyage was increased by 54 miles, and from Havre to the nearest point of the ordinary route to Dover the distance was 68 miles.

BAILHACHE, J., found that the master had received no warning that any danger was to be anticipated in calling at Havre, and that there was no greater likelihood of danger in going there than in going to London, but he held that Havre was not "an intermediate port," and that the deviation was not authorised by the bills of lading, and therefore the defendants could not rely upon the exception as to the King's enemies, and were liable to the plaintiffs. The defendants appealed.

Decision

The **Court of Appeal** held that Havre was not an intermediate port within the meaning of the bills of lading, and that there had been an unauthorised deviation, and the appeal was dismissed.

In the course of his judgment, SWINFEN EADY, L.J., said:—

"It must be borne in mind when considering the true construction and effect of bills of lading that it is important to everyone concerned in the carriage of goods by sea—whether shipper, shipowner, or insurer—that the route by which the ship and goods are to pass should be determined, that the risks may be estimated on that basis. . . . I am of opinion that it is impossible to lay down any hard and fast rule by which it may be determined whether any particular port is an intermediate port within the meaning of the bill of lading. In construing the documents, all the surrounding circumstances must be taken into consideration. The size and class of ship, the nature of the voyage, the usual and customary course, the natural or usual ports of call, the nature and position of the port in question. It

is a question of fact in each case, and in my judgment, BAILHACHE, J., was right in deciding that Havre was not an intermediate port on the voyage of this vessel from New Zealand to London, and that the *Tokomaru* in making for that port was deviating from her voyage, and that the defendants thereby lost the benefit of the exceptions in the bill of lading. . . . If that be so, the remaining question is whether the defendants are protected from liability as carriers by the fact that the loss occurred through the King's enemies. If they, as carriers, were duly performing their contract of carriage, they would not be liable for loss occasioned by the King's enemies. But they were breaking their contract. They are quite unable to show that the loss must have occurred in any event, and whether they had deviated or not."

NOTES

The principle which is applied in these deviation cases is well illustrated in *Lilley v. Doubleday* (1881), 7 Q. B. D. 510. There, goods belonging to the plaintiff and kept in the defendant's warehouse were destroyed by fire, and the plaintiff brought this action to recover their value. The contract had provided for the goods to be stored at the defendant's repository, but some of them were in fact warehoused elsewhere, and these latter perished there, without negligence on the part of the defendant. The plaintiff had insured the goods, but since he had given the repository as the place where they were deposited he lost the benefit of the policy. It was held that the plaintiff must recover. By depositing the goods elsewhere than in the repository the defendant had committed a breach of contract. Only on one condition would this breach be harmless, namely, if it can be shown that the goods would have been destroyed inevitably, even if they had been deposited at the place agreed upon in the contract. GROVE, J., said at p. 511:—

"If a bailee elects to deal with the property entrusted to him in a way not authorised by the bailor, he takes upon himself the risks of so doing, except where the risk is independent of his acts and inherent in the property itself."

Where a deviation is necessary for the safety of the ship or crew, then the shipowner will not lose the benefit of the exceptions contained in the contract, even though the deviation became necessary through unseaworthiness which was due to some neglect or default on the part of the master of the ship. (See *Kish v. Taylor*, [1912] A. C. 604.)

To the instances where deviation is justified at common law (see Stevens' Elements of Mercantile Law, 10th Edn., pp. 484, 496) the Carriage of Goods by Sea Act, 1924, by Article IV, rule 4 of its Schedule has added deviation in order to save or attempt to save life or property at sea, and any "reasonable deviation." Where therefore the Act applies, that is to outward sailings from a port in Great Britain or Northern Ireland, these deviations are also justified, and

do not constitute a breach of the contract of affreightment. The words "reasonable deviation" are somewhat vague, and there have so far not been a sufficient number of cases before the Courts to enable us to say exactly what types of deviation they are intended to cover.

In the case of *Stag Line, Ltd. v. Foscolo, Mango & Co., Ltd.*, [1932] A. C. 329, cargo was shipped under bills of lading from Swansea to Constantinople on the *Ixia*. The vessel was fitted with a superheater and two engineers were taken on board to test it on part of the voyage. When the test was completed the engineers were landed in St. Ives Bay, which was slightly off the route from Swansea to Constantinople. After the landing the captain did not take the shortest way back to the contract route, but steered a course along the Cornish coast with the intention to regain the route a little farther on. Before that point was reached the ship stranded and ship and cargo were lost. The cargo-owners sued the shipowners for damages, but the latter relied on an exception clause in the bill of lading and contended that this had not been displaced by the deviation, since it was a "reasonable" one in the meaning of article IV, r. 4, of the Schedule to the Carriage of Goods by Sea Act. It was held however in the House of Lords that though the deviation to St. Ives was probably reasonable, the deviation after leaving that Bay before regaining the contract route was unreasonable, and that the shipowners were liable to the cargo-owners for the loss; the exception clause had ceased to apply to the contract by reason of the deviation.

Lord ATKIN said, in the course of his speech, at p. 343:—

"I cannot think that it is correct to conclude . . . that r. 4 was not intended to extend the permissible limits of deviation (as applying prior to the Act). This would have the effect of confining reasonable deviation to deviation to avoid some imminent peril. Nor do I see any justification for confining reasonable deviation to a deviation in the joint interest of cargo-owner and ship . . . or even to such a deviation as would be contemplated reasonably by both cargo-owner and shipowner. . . . A deviation may, and often is, caused by fortuitous circumstances never contemplated by the parties to the contract; and may be in the interests of the cargo, or where the crew are in danger of

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Unjustifiable deviation displaces the bill of lading contract and with it any exceptions included there; accordingly shipowners are liable for damage which happens after deviation though not caused by it: *Joseph Thorley, Ltd. v. Orchis S.S. Co., Ltd.*, [1907] 1 K. B. 660. In that respect the effect of deviation differs from that of unseaworthiness, see *The Europa, infra*.

SEAWORTHINESS

THE EUROPA,

[1908] P. 84

- (i) *In contracts of carriage not governed by the Carriage of Goods by Sea Act, 1924, there is an implied warranty that the carrying ship is seaworthy.*
- (ii) *The shipowner is liable for damage to cargo resulting from unseaworthiness.*

Facts of the Case

A steamship, the *Europa*, was chartered to carry a cargo of sugar, in bags, from Stettin to Liverpool, one of the excepted perils in the charterparty agreement being "collision."

When entering the dock at Liverpool the port bow struck the dock wall, the blow breaking a water-closet pipe, so that water got through into the 'tween decks and some of the bags of sugar were damaged.

In the 'tween decks were two scupper holes, near the water-closet pipe. The pipes which had originally been fixed to these scupper holes for the purpose of carrying off water from the 'tween decks to the bilges had been removed, and the scupper holes had been imperfectly plugged. The result was that the water from the broken closet pipe got through the scupper holes, and passed direct into some of the bags of sugar stored in the

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of the contract and the interests of all parties concerned, but without obligation to consider the interests of any one as conclusive." With regard to the facts of the case Lord ATKIN thinks (p. 344) "That after St. Ives the coasting course directed by the master was not the correct course which would ordinarily be set in those circumstances. It is obvious that the small extra risk to ship and cargo caused by the deviation to St. Ives, was vastly increased by the subsequent course. It seems to me not a mere error of navigation but a failure to pursue the true course from St. Ives to Constantinople which in itself made the deviation cease to be reasonable."

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lower hold. This imperfect plugging existed before the vessel started from Stettin, and it was admitted that, to that extent the vessel was unseaworthy, and that the damage to the bags of sugar in the lower hold was caused through that unseaworthiness.

The charterers claimed for the damage to the bags of sugar in the lower hold, and also to the bags in the 'tween decks. The shipowners admitted the former damage was caused directly by the unseaworthiness, and did not dispute their liability for that but they denied liability for the latter damage (in the 'tween decks) on the ground that that was not caused by the unseaworthiness but was the result of the collision with the dock wall, which was an exception in the charterparty. The Judge of the Liverpool County Court decided on the authority of the case of *Joseph Thorley, Ltd. v. Orchis SS. Co., Ltd.*, [1907] 1 K. B. 660, that as in the charterparty there was a warranty of seaworthiness, that was a condition precedent, and as it had been broken, the express contract was accordingly displaced, and the shipowners were liable to the charterers for the whole of the damage, and it was immaterial to consider what part of the damage to the cargo was caused by the collision with the dock wall. The shipowners appealed.

Decision

It was held by the **Divisional Court** that the warranty of seaworthiness was not a condition the breach of which displaced the provisions of the charterparty, and therefore the charterers could only recover in respect of the damage to the bags of sugar in the lower hold which was the result of the unseaworthiness of the ship, and could not recover in respect of the bags in the 'tween decks which were damaged as the result of the collision with the dock wall, that being excepted by the terms of the charterparty.

In delivering the judgment of the Court, BUCKNILL, J., said:—

"The question raised on this appeal is a very important one, and we think the exact point has not yet been decided . . . in other words, whether seaworthiness is a condition precedent in a charter of affreightment, to the extent that if the ship be unseaworthy the shipowner is reduced to the position of a common carrier and liable for all damage occasioned to the cargo, even if such damage be solely caused by an excepted peril and not by the unseaworthiness. . . . We are of opinion that the *Orchis* is not a case that can properly be relied on as an authority justifying the judgment of the County Court Judge from whose decision this appeal comes, and in our judgment the plaintiffs are only

entitled to recover from the defendants such damage as directly resulted from want of seaworthiness and not for the damage caused by the water which got into the 'tween decks through the collision between the ship and the dock wall which was covered by the excepted perils in the charterparty, and to the protection of which the shipowner was still entitled, notwithstanding the unseaworthiness of the vessel."

NOTES

Although called a warranty, the undertaking by the shipowner that the vessel is seaworthy is in fact a condition, and the breach of it gives the charterer the right to avoid the contract, if he can do so while it is still executory. The position should be compared with that under Insurance (see *supra*, pp. 249 *et seq.*). The effect of a breach of this warranty is unlike a breach of the obligation not to deviate in that it does not displace the contract of carriage, and, as the above case of *The Europa*, *supra*, shows, the carrier may rely upon the terms of the contract for protection in cases of damage to cargo by excepted perils provided the operation of such perils has not been contributed to by the unseaworthiness.

To be seaworthy a vessel must not only be fit to encounter the ordinary risks of her voyage, but also to carry a cargo of the kind contemplated by the contract of affreightment. This latter warranty of cargoworthiness was broken in *Tattersall v. National S.S. Co.* (1884), 12 Q. B. D. 297. There live cattle was shipped under the conditions that no more than £5 per animal should be payable, and that no liability should exist in the event of death or injury by disease. But as the shipowners had not properly disinfected the ship after a previous transport, the cattle contracted foot and mouth disease. The shipowner's omission was held to constitute a breach of the warranty of cargoworthiness, and he was prevented from relying on the exception clause.

ASFAR & CO. v. BLUNDELL, [1896] 1 Q. B. 123

In the absence of agreement to the contrary, freight is not payable in respect of the carriage of goods which are delivered in an unmerchantable state, unless that it is due to the fault of the consignor.

Facts of the Case

The plaintiffs were merchants at Bussorah and the defendants were underwriters in London. The plaintiffs entered into a charterparty with the owners of a steamship for the hire of the

ship from Bussorah and other places to London, for a lump sum, on the terms that all freight earned by the ship should belong to the plaintiffs. Among the cargo shipped by various parties were some dates, which were shipped under bills of lading which made the freight payable on right delivery. The plaintiffs insured their profit on the charter with the defendants.

After arrival of the ship in the Thames, but before she had reached her discharging dock, she was run into by another vessel and almost submerged for two or three tides, but was then raised and docked. The cargo of dates was saturated with sewage and in a fermenting condition, and was condemned by the sanitary authorities as unfit for human food. But although the dates were unmerchantable, a large proportion of them still retained the appearance of dates and had a considerable value for distillation into spirit, and were sold for that purpose.

The plaintiffs sued the defendants as insurers of the freight, and one point raised was whether the plaintiffs could have claimed freight from the owners of the dates, or whether in the circumstances that freight was irrecoverable as on a total loss, and whether the defendants were liable for it as insurers to the plaintiffs.

Decision

The **Court of Appeal** held that the freight was not payable in respect of the dates and therefore the defendants were liable to the plaintiffs as insurers.

In the course of his judgment, Lord ESHER, M.R., said :—

“ The first point taken on behalf of the defendants, the underwriters, is that there has been no total loss of the dates, and therefore no total loss of the freight on them. The ingenuity of the argument might commend itself to a body of chemists, but not to business men. We are dealing with dates as a subject-matter of commerce ; and it is contended that, although these dates were under water for two days, and when brought up were simply a mass of pulpy matter impregnated with sewage and in a state of fermentation, there had been no change in their nature, and they were still dates. . . . But if the nature of the thing is altered, and it becomes for business purposes something else, so that it is not dealt with by business people as the thing which it originally was, the question for determination is whether the thing insured, the original article of commerce, has become a total loss. If it is so changed in its nature by the perils of the sea as to become an unmerchantable thing, which no buyer would buy and no honest seller would sell, then there is a total loss. That test was applied in the present case by the learned

Judge in the Court below, who decided as a fact that the dates had been so deteriorated that they had become something which was not merchantable as dates. If that was so, there was a total loss of the dates. . . . If they were totally lost as dates, no freight in respect of them became due from the consignee to the person to whom the bill of lading freight was payable—that is, to the charterers—and there was a total loss of the bill of lading freight on the dates."

NOTES

This case should be compared with *Duthie v. Hilton* (1868), L. R. 4 C. P. 138. There the defendants shipped cement under bills of lading which provided for freight to be paid "within three days after arrival of ship, and before delivery of any portion of the goods." The ship arrived at the port of destination, but within the first three days after her arrival a fire accidentally broke out on board, and the ship was scuttled with a view to saving ship and cargo. When the ship was ultimately raised the cement had become useless. Nevertheless the shipowners sued the shippers for the freight. It was held that the action could not be maintained, as the shipowners were no longer able to perform their part of the contract. BRETT, J., explained the effect of the bill of lading clause and in what respect it differed from the ordinary bill of lading in this way:—

"If the freighters within the three days demanded the goods and tendered the freight, the shipowners would be bound to deliver them. But, after the expiration of the three days, I incline to think that the ordinary state of things would be altered, and that the shipowner might sue for the freight without averring readiness and willingness to deliver. Here, however, the plaintiffs could not at any time have averred that they were ready and willing to deliver, the goods having been destroyed before the expiration of the three days. I therefore think they are not entitled to recover."

As to payment of freight generally, see Stevens' Elements of Mercantile Law, 10th Edn., pp. 497 *et seq.*

GENERAL AVERAGE

JOHNSON *v.* CHAPMAN (1865), 19 C. B. (N. S.) 563

Where a party to a maritime adventure suffers loss intentionally inflicted to escape a common danger, all those

interested in the voyage must contribute to the compensation. This is the principle of general average.

Facts of the Case

In November 1863, the *Shooting Star* sailed from Quebec to London with a cargo of deals and staves. She encountered very heavy gales which caused part of the cargo to break loose, damage the ship's boats, and hinder the operation of the pumps. Since water was rising in the ship and it was impossible to secure the cargo again part of it was jettisoned to lighten the ship and save the adventure.

Decision

It was held that the owner of the jettisoned cargo was entitled to claim general average contribution from the shipowner.

WILLES, J., said (at p. 581):—

“First of all there must be a common danger. It must be a maritime peril, and it must be common to the whole adventure. . . . And then, secondly, there must be a sacrifice, in the sense of intentional sacrifice.”

NOTES

There was one complication in the above case, namely, that the cargo was carried on deck, an improper form of stowage which disqualifies for general average contribution, unless all parties agree or the custom of the trade allows this form of carriage, as, for instance, is the case in the timber trade. In *Johnson v. Chapman* the charterparty specially provided for the carriage on deck, and since there was only one cargo-owner his right to contribution was secured.

Jettison is only one kind of general average sacrifice, although it is historically the earliest to be met with, dating back to the classical age. In modern times general average expenditure, which is extraordinary expenditure incurred for the preservation of ship and cargo, e.g. when the shipowner has to repair the ship in a port of refuge in order that the voyage may be completed, has become common. It is analogous to general average sacrifice and is dealt with in the same way.

Although the broad principles of general average are common to all maritime laws differences in detail, especially as regards the adjustment of contributions, exist, and since general average acts are often committed, and contributions adjusted, abroad, the differences in national laws were for long keenly felt by traders and shipowners. Representatives of these interests accordingly agreed at conferences held in York and Antwerp on a uniform set of rules—called the York/Antwerp Rules—which could be applied internationally. No country has given the Rules legislative force, but they are almost invariably

embodied in charterparties, bills of lading, and policies of marine insurance.

A case decided on these Rules, which had been incorporated in the contract of affreightment, was *Vlassopoulos v. British and Foreign Marine Insurance Co., Ltd.*, [1929] 1 K. B. 187. This case illustrates the kind of danger that must exist to make a sacrifice or expenditure a general average act.

While the *Makis* was loading pitprops at Bordeaux her foremast accidentally broke, fell on to, and damaged, the main deck; a derrick attached to it fell into a hold and was also damaged. The ship was at no time in danger, but was moved into a wet dock for repairs before proceeding on her voyage. Later, when the *Makis* was at sea, her propeller fouled submerged wreckage and was damaged. This rendered her unfit to encounter the ordinary perils of the sea, and she put into Cherbourg for repairs; these were necessary for the common safety of ship, cargo and freight. The owners of the *Makis* incurred expenses at Bordeaux and Cherbourg in connection with both casualties, namely, wages and provisions for master, officers and crew during the periods of repair; coal for shifting the vessel in and out of dock; remuneration for those handling the cargo on board and discharging it; and charges for towage in and out of port, for mooring and the use of the ports. Charterparty and insurance policy embodied the York/Antwerp Rules. In this action the owners of the *Makis* claimed contribution from the other interests.

It was held that the owners could recover nothing in respect of expenses and charges incurred at Bordeaux. The ship was not in danger there and the money was accordingly not spent for the common safety of ship, cargo and freight. But contributions were recoverable in respect of expenses incurred at Cherbourg. ROCHE, J., said (at p. 199): To enter Cherbourg

"was necessary for the common safety of the ship, cargo and freight. Accordingly, the consequent expenses were expenses which were incurred for the common safety for the purpose of preserving from peril the property involved in the common maritime adventure, or were damages, loss or expenses which were the direct consequences of the general average act which took place when the master determined to proceed to the port of refuge."

To justify a general average act danger must be "immediate," but unwarranted weight must not be attached to this word. While the ship must be in the grip of danger, she need not be in the grip of disaster.

"It is not necessary that the ship should be actually in the grip, or even nearly in the grip, of the disaster that may arise from danger. It would be a very bad thing if shipmasters had to wait until that state of things arose in order to justify them doing an act which would be a general average act. . . . It is sufficient to

say that the ship must be in danger, or that the act must be done in order to preserve her from peril. It means, of course, that the peril must be real and not imaginary, that it must be substantial and not merely slight or nugatory."

These considerations did not apply to the accident at Bordeaux, where the ship was in no danger. Expenses there were not incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.

The York/Antwerp Rules differ but slightly from the common law. Two such changes are illustrated by the Vlassopoulos Case. At common law the danger must be immediate to justify a general average act, while under the Rules an act is regarded as general average if immediate danger would result if it were not taken. Again, at common law charges for putting into a port of refuge are recoverable, but charges for leaving it are not, because the ship is then no longer in danger. The Rules take a broader view and allow the shipowner to recover also in respect of charges incurred when leaving the port of refuge.

For the purpose of the student who is only concerned with the general principles the distinction between the two sets of rules may be disregarded. But he should realise that the words "general average" are used in three distinct though connected senses. They denote the act of making the sacrifice, the loss sustained by it, and the contributions levied on those interested in the adventure to recoup the loser. This last meaning brings out the idea on which general average is based. The law regards a maritime adventure as an undertaking in which the co-adventurers stake no more of their property than the assets actually involved in the voyage. The shipowner must not lose more than his ship, the cargo-owner not more than his cargo, and the carrier entitled to the freight not more than the freight. Accordingly, neither of the three interests need contribute if his property is altogether lost. The common law and the York/Antwerp Rules express this by the statement that the general average act must be successful to entitle the immediate loser to claim contribution from the co-adventurers. If, say, a cargo-owner whose cargo was lost altogether were made to contribute to a general average act that caused damage to ship and other cargo on board he would have to pay out of his general funds which are not at stake in the voyage, and the law accordingly exempts him from this kind of contribution.

On the same principle the party making the claim cannot recover the full value of the property sacrificed or the full amount of the expenditure made, for he would then come off better than the other parties involved. He must himself contribute rateably in proportion to the value of his own interest which is involved, and abate his claim to that extent.

SURETYS^HIP

GUILD & CO. v. CONRAD,
[1894] 2 Q. B. 885

Distinction between a contract of guarantee or suretyship which requires to be evidenced by writing under s. 4 of the Statute of Frauds, 1677, and a contract of indemnity which does not require to be so evidenced.

Facts of the Case

The plaintiffs were merchants in London. The defendant was a member of a firm of merchants carrying on business in London and Demerara, and he introduced to the plaintiff a firm of Wakefield & Watson, who were dealers in bread-stuffs in Demerara, and at his request the plaintiff agreed to give that firm bill-credit for £2,000 on certain terms. Later, defendant's son became a member of that firm, which was then called Conrad, Wakefield & Co.

In June, 1888, the plaintiff agreed in writing to increase the amount for which the firm of C. W. & Co. might draw on him to £5,000 in consideration of the defendant agreeing in writing to keep the plaintiff in funds to meet the bills so drawn on him, and in March, 1891, the plaintiff orally agreed with the defendant to increase the amount of such bill-credit to £10,000 upon the defendant increasing his guarantee to £6,000.

In December, 1891, the plaintiff was only prevailed upon to continue the credit facilities by the defendant declaring by word of mouth : "If you accept these bills I will guarantee them."

In January, 1892, a further interview took place between the same three persons, with reference to a further batch of bills of C. W. & Co. for £5,280, and the plaintiff said he also accepted these on the defendant's oral promise of his personal guarantee. The defendant denied that he gave any such guarantee or undertaking to the plaintiff at either of these interviews.

C. W. & Co. were unable to meet the bills, and the plaintiff had to discharge them, and thereupon he sued the defendant to recover £17,230, being £5,000 under the written guarantee of June, 1888, £1,000 under the increased oral guarantee of March, 1891, £5,950 under the alleged oral undertaking of December, 1891, and £5,280 under the similar alleged undertaking of January, 1892. The defendant contended that the undertakings in December, 1891, and January, 1892, and also the one in March,

1891, were unenforceable because they amounted to guarantees and therefore were required to be evidenced by writing under section 4 of the Statute of Frauds.

Decision

The **Court of Appeal** held that the defendant was liable on the written guarantee and also on the oral undertakings of December, 1891, and January, 1892, but not on the oral increase of the written guarantee of March, 1891.

In his judgment, **LINDLEY, L.J.**, said, at p. 891 :—

“ There is no question that (the written guarantee) was a guarantee in the proper sense of the term; that is, it was an undertaking by the defendant to be responsible for the Demerara firm for £5,000. This was in writing; but by a verbal guarantee the amount was enlarged afterwards, in March, 1891, to £6,000. The plaintiff claimed that enlarged amount under this verbal guarantee; but the learned Judge below has decided this claim in favour of the defendant, and no appeal has been brought in respect of that decision.”

With regard to the verbal undertakings of December, 1891, and January, 1892, the learned Lord Justice said, at p. 892 :—

“ The nature of the promise is all-important because, if it was a promise to pay if the Demerara firm did not pay, then it is void under the Statute of Frauds as not being in writing. But if, on the other hand, it was a promise to put the plaintiff in funds in any event, then it is not such a promise as is within the Statute of Frauds. I think that the learned Judge has taken the true view, though it is very near the line. I cannot help thinking that the true result of those interviews was this—that the defendant did promise the plaintiff that, if he would accept those batches of bills, he, the defendant, would take care that they should be met, and that he himself would provide funds to meet them; and it was on the faith of that promise that the plaintiff accepted those bills. If this is the real contract, and if the learned Judge is right in saying that the contract was not a contract to pay if the Demerara firm did not pay, but was a contract to pay in any event, then, in my opinion, the authorities show that the Statute of Frauds does not apply.”

NOTES

It should be observed that when the learned Lord Justice speaks of the contract being void he means that it is unenforceable only.

(1) **ALLNUTT v. ASHENDEN**
(1843), 5 M. & G. 392

(2) **WOOD v. PRIESTNER**
(1867), L. R. 2 Exch. 282

The difference between a single and a continuing guarantee.

Facts of the First Case

The plaintiffs were wine merchants in London and had supplied spirits to one Jennings, who owed them £83 1s. At the request of Jennings and on the application of the plaintiffs, the defendant signed a guarantee to the plaintiffs in the following terms :—

“ Sirs,—I hereby guarantee Mr. John Jennings’ account with you for wines and spirits, to the amount of £100.

“ Signed, E. ASHENDEN.”

After the guarantee had been given, the plaintiffs continued to supply Jennings with spirits to the value of £814 3s. 4d., during which time he paid them various sums amounting to £611 14s. 2d., and the total balance owing to the plaintiffs on the whole account was £218 9s. 2d.

The plaintiffs claimed payment from the defendant of £100 under his guarantee, and the question arose, whether the guarantee applied only to the account of £83 1s. (or any balance thereof still owing) which was due at the time the guarantee was given, or whether it was a continuing guarantee, and applied also to the items supplied afterwards.

Decision in the First Case

It was held by the **Court of Common Pleas** that the guarantee was not a continuing one but applied only to the account of £83 1s. (or any balance thereof) which was owing at the date of the guarantee.

In his judgment, TINDAL, C.J., said :—

“ Applying to this guarantee that rule of construction which has been so often laid down, that we must give to the words used their natural meaning, I do not see how this can be considered as a prospective guarantee; and if not, there is no consideration disclosed upon the face of it. The words are, ‘I hereby guarantee Mr. John Jennings’ account with you for wines and spirits, to the amount of £100.’ By ‘account’ I understand

the parties to mean some account contained in some ledger or book; and the case shows that there was such an account existing at that time. The natural construction of the guarantee therefore is, that it relates to that account. . . . I think the proper construction of the instrument is, that it is an undertaking merely to be answerable for some existing account."

Facts of the Second Case

The defendant's son was a coal dealer, and he purchased coals from the plaintiffs, who traded in the name of a company. In June, 1861, he owed them about £170, and they refused to continue to supply him unless he gave security. Thereupon he paid £9, and accepted a bill for £61, and got his father, the defendant, to give a guarantee for £100.

The guarantee was in the following terms:—

"In consideration of the credit given by (the company) to my son, Mr. James Priestner, for coal supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of £100, and in default of his non-payment of any accounts due, I bind myself by this note to pay to (the company) whatever may be owing, to an amount not exceeding the sum of £100.

"Signed, WM. PRIESTNER."

The plaintiffs then continued to supply the son with coal until June, 1865, when he executed a deed of assignment under the Bankruptcy Act. He then owed the plaintiffs £349, of which his assets would pay only a small fraction. The debt of £170 owing at the date of the guarantee appeared to have been discharged in the meantime by payments on account. The plaintiffs now sued the defendant on the guarantee to recover the sum of £100, and again the question for decision was whether the guarantee related only to the account owing when the guarantee was given or was a continuing guarantee.

Decision in the Second Case

It was held by the **Court of Exchequer Chamber** (affirming the **Court of Exchequer**) that the guarantee was a continuing one and the defendant was liable.

In delivering the judgment of the Court, WILLES, J., said:—

"This guarantee was given in favour of the defendant's son, a person who had previously had a monthly credit given to him by the plaintiffs. He was desirous of having that credit given again, and accordingly obtained this guarantee. It commences with the words 'in consideration of the credit given by (the

company) to my son,' and these words appear applicable to the same credit already given, continued . . . Then, after stating that the defendant would hold himself responsible as a guarantee for £100, it proceeds thus: 'In default of non-payment of any accounts due,' an expression which might, it is true, be limited to any accounts then due, but which seems rather to refer to anything which might appear from time to time to be due on the current accounts between the parties. The guarantee then binds the defendant to pay 'whatever may be owing,' words which, again, might possibly be applied to whatever might be owing upon accounts between the parties being struck. They seem to us, however, to apply rather to a future state of things. Under these circumstances the natural construction appears to be that the surety should be answerable for whatever might become due on the account to the amount of £100."

NOTES

It will be seen that each case must be decided on the language of the document and the presumed intention of the parties.

As is indicated in the judgments quoted above a specific guarantee provides for securing of a specific advance or for advances up to a fixed sum, and ceases to be effective on the repayment thereof, while a continuing guarantee covers a fluctuating account such as an ordinary current account at a bank, and secures the balance owing at any time within the limits of the guarantee, irrespective of the receipt of payment in reduction of the debit owing.

It should be observed that when Tindal, C.J., in the first case speaks of a "prospective" guarantee he means what to-day is termed a "continuing" guarantee.

FORBES v. JACKSON

(1882), 19 Ch. D. 615

On payment of the debt guaranteed by him, a surety is entitled to the benefit of all securities held by the creditor.

Facts of the Case

By an indenture of mortgage dated December 28th, 1854, made between one Spence of the first part, the plaintiff, Forbes, of the second part, and one Weir of the third part, Spence assigned leasehold property and also a policy of assurance on his life to Weir as security for the sum of £200 and interest. By the same deed the plaintiff covenanted with Weir that while any part of the sum of £200 should remain owing he would pay

the interest thereon to Weir and also the premiums on the said policy of assurance, and as a further security the plaintiff also assigned to Weir a policy of assurance on his own life. The plaintiff joined in the mortgage as surety for Spence, because Weir had declined to lend the £200 to Spence unless the plaintiff so joined.

Subsequently, Weir lent to Spence further sums amounting in all to £530, and by successive indentures he charged the above property with the payment of those sums and interest. But the plaintiff had no knowledge of these further advances until November, 1875.

Spence paid interest on the £200 until June, 1867, and also the premiums on his policy. Weir died in September, 1878, and his executors made a demand upon the plaintiff for arrears of interest on the £200 from June, 1867. He paid these, and also the interest up to December, 1879, and he also paid the premiums on the policy of Spence from 1868 onwards, and also certain costs in connection with the mortgage.

In December, 1879, the plaintiff gave Weir's executors notice of his intention to pay off the £200, and later he tendered that sum and interest and offered to pay any necessary costs, and requested them to transfer to him all the securities comprised in the mortgage of December 28th, 1854, including the leasehold property, but they declined to accept that sum and required him to pay also the other sums totalling £530 lent by Weir to Spence and the interest thereon. They were willing to accept from the plaintiff the £200 and to assign to him the two life policies (his own and that of Spence), but they claimed to retain the leasehold property as security for the further sum of £530 so advanced.

Decision

It was held by HALL, Vice-Chancellor, that on payment of the sum of £200 and interest guaranteed by him, the plaintiff was entitled to have all the securities comprised in the mortgage of December 28th, 1854 (including the leasehold property) handed over to him, and he was not affected by the subsequent advances of £530 made by Weir.

In his judgment, after referring to the decision of Vice-Chancellor Sir W. PAGE WOOD in the case of *Newton v. Chorlton* (1853), 10 Hare, 646, HALL, V.-C., said:—

“The principle on which Vice-Chancellor Sir W. PAGE WOOD proceeded was the same as laid down by Lord ELDON in the case

of *Mayhew v. Crickett* (1818), 2 Sw. 185, which I consider a leading authority, and also laid down in earlier cases: that the surety is entitled to have all the securities preserved for him, which were taken at the time of the suretyship, or, as I think it is now settled, subsequently. Nor does it matter at all in principle whether the creditor takes a further security for further advances made prior to the time when the surety makes payment of the debt. They have nothing to do with the surety. He is entitled to the benefit of the securities though his payment be not made until after the time when the further advances were made by the creditor. The principle is that the surety in effect bargains that the securities which the creditor takes shall be for him, if and when he shall be called upon to make any payment, and it is the duty of the creditor to keep the securities intact; not to give them up or to burthen them with further advances."

NOTES

If a person is surety for part of a debt only, then, on payment of that part, he is entitled to a proportionate share of any securities held by the creditor for the whole debt. (See *Goodwin v. Gray* (1874), 22 W. R. 312.)

The result appears to be that as regards securities received by a creditor expressly for the debt which has been guaranteed by the surety, the surety is entitled to the benefit of those securities, on paying the debt guaranteed by him whether the securities were given to the creditor at the time of the guarantee or subsequently. And that right of the surety is not affected by any later advances made by the creditor to the principal debtor. But as regards securities given to the creditor in respect of other debts, as well as the one guaranteed, then, on paying off the guaranteed debt, the surety is only entitled to a proportionate share of those securities.

MIDLAND MOTOR SHOWROOMS v. NEWMAN, [1929] 2 K. B. 256

Where a debt has been guaranteed, and the creditor makes a binding contract to give the principal debtor further time for payment, without the assent of the surety, and without reserving his rights against the surety, the surety is discharged.

Facts of the Case

By an agreement dated July 6th, 1927, the Regent Construction and Finance Company Ltd. entered into a hire-purchase agreement with one Toye by which he obtained from them a motor-car

on the terms that he made a first payment of £22 6s. 8d. and then paid £14 3s. 4d. per month. On the same date the defendant Mrs. Newman gave the company a written guarantee for the performance by Toye of the terms of the hire-purchase agreement.

Toye got into arrears with the monthly instalments, and on February 3rd, 1928, he wrote informing the company that a friend of his was willing to send them a cheque for £20 and promising that if they would accept this, he (Toye) would pay the balance of the arrears within a month. The company wrote to Toye on February 4th agreeing to accept the £20 on account, the arrears to be paid within one month. The cheque for £20 was sent, but Toye did not pay the arrears as promised, and the company took the motor-car back. The arrears then stood at £79 13s. 4d., and the company incurred £43 upon necessary repairs to the car.

By a deed of assignment dated September 18th, 1928, the company assigned their rights under the hire-purchase agreement to the present plaintiffs, who now claimed from the defendant, as guarantor, the said arrears and cost of repairs, amounting together to £122 13s. 4d. The defendant contended that by the letters of February 3rd and 4th the R. C. and F. Company had entered into a binding agreement with Toye to extend his time for payment without her consent and therefore she was discharged from liability under her guarantee.

Decision

AVORY, J., held that this contention was right, and that the defendant was discharged from liability. In the course of his judgment, AVORY, J., said:—

"The question in this case is whether the Regent Construction and Finance Company did in fact give time to the principal debtor for payment of the monthly hire rent, and if they did, whether the surety, the present defendant, is in consequence thereof discharged. That they did give time to the principal debtor is a fact I think beyond dispute as appears from the letters of February 3rd and 4th, 1928. Then it is said on behalf of the plaintiffs that there was no binding contract to give time; in other words, that there was no consideration for it, and, therefore, no contract. . . . It is clear in the letter of February 3rd, and the answer given by the Regent Construction and Finance Company on February 4th, that what they were accepting was an offer by the debtor, who stated that he was not in a position to pay £20, but he would have a cheque for £20 sent to them from a friend of his. The company agreed to accept the cheque

for £20 from his friend, and I think in those circumstances that, within the authorities, they were accepting a negotiable security in part payment of a larger sum of money then due, and that is clearly a good consideration. If they did give time, the only question which remains is whether that discharged the present defendant only from the payment of the amounts which were then due, or whether it operated to discharge her altogether from her obligations under this guarantee . . . ”

After referring to a judgment in an earlier case, AVORY, J., continued :—

“ Now, I read that as saying that if there is one contract, and time is given in respect of one performance under it, that operates as a discharge of the whole contract. In my opinion this was one contract and cannot be separated for the purpose of payment every month. I think it follows that the defendant is discharged and is entitled to judgment with costs.”

NOTES

The creditor can, however, reserve his rights against the surety. Thus in *Nichols v. Norris* (1831), 3 B. & Ad., 41, Johnston requested the plaintiff to supply him with coals, but the latter was only prepared to do so if security were given to the extent of £50. Accordingly the defendant made a promissory note for £50 in favour of Johnston, who indorsed it to the plaintiff. Subsequently, Johnston became further indebted to the plaintiff and a composition was entered into by which the latter agreed to accept a certain sum in discharge of the whole debt. It was stipulated in the composition deed that as the plaintiffs held several securities for their demands on Johnston, they should not be debarred from suing on them by the new arrangement. In an action against the surety on the note given by him he was held liable, because, in the words of LITTLEDALE, J., at p. 42, “ the special proviso here takes the case out of the common rule as to the discharge of sureties by giving time to the principal.” It is not necessary for the surety to be a party to the agreement in which the rights against him are reserved, for it should be borne in mind that any reservation of remedies against a surety does not affect adversely existing rights of the latter, but only of the principal debtor. This happens in this way. As soon as the surety has paid the creditor, he can recoup himself against the principal debtor, so that the latter though freed from his obligation against the creditor becomes exposed to an action by the surety, thus largely neutralising the agreement between him and the creditor. On the other hand the surety is always liable to the creditor. This was explained by Lord CAIRNS, L.C., in *Muir v. Crawford* (1875), L. R. 2 H. L. Sc., 456, at pp. 457–8 :—

“ There is no doubt that it is competent for the holder of a security of this kind to agree with the principal debtor not to

enforce his remedies against him; and, if he does so by an apt instrument, which at the same time reserves his rights against those who are liable in the second degree, there will be no discharge of those persons. The principal debtor will not be entitled, if he should be sued by the surety (namely after the latter had discharged the debt to the creditor), to say (namely to the creditor): 'You have discharged me completely from the debt; but I am now sued by a person who was surety, and that is inconsistent with the discharge which I received from you.'"

Therefore it has been held in an action by a surety against the debtor, who had entered into a composition with the creditor, but reserving the surety's liability, that the surety was entitled to recover. (See *Kearsley v. Cole* (1846), 16 M. & W. 128.)

If a creditor has obtained judgment against both the principal debtor and the surety, and then makes a binding agreement with the principal debtor to give him further time for payment, that will not discharge the surety. (See *In re a Debtor*, [1913] 3 K. B. 11.)

PLEDGES OF PERSONAL PROPERTY

**NORTH WESTERN BANK, LTD. v. JOHN POYNTER, SON
AND MACDONALDS,**

[1895] A. C. 56

A pledgee of goods may redeliver them to the pledgor for a limited purpose without losing his rights under the contract establishing the pledge.

Facts of the Case

Page & Co. were the holders of a bill of lading in respect of a cargo of phosphate rock. They pledged the document with the appellants as security for an overdraft. Subsequently Page & Co. desired to sell the phosphate rock to Cross & Sons, and in order to make delivery possible the appellants surrendered the bill of lading to Page & Co., constituting the latter their trustees in respect of the price due from Cross & Sons. Before the price was paid by Cross & Sons to Page & Co. the latter stopped payment, and the respondents, who were general creditors of Page & Co., arrested the money due to that firm in the hands of Cross & Sons. The appellants claimed that they were entitled to those moneys as pledgees of the goods.

Decision

It was held by the **House of Lords** that they were right.

In the course of his speech Lord HERSCHELL, L.C., said, at pp. 67 *et seq.* :—

“ Was it (namely, the sale by Page to Cross) a sale for or on behalf of the bank, or was it a sale of Page's goods in respect of which the bank could not claim to be principals? My Lords, the only ground upon which the Courts below have decided that it was a sale, not of the bank's goods, but of Page's goods, is this, that in order that a pledge may be effectual possession must continue in the pledgee—that parting with the possession is parting with his security and with any property which the pledgee gives, and that even if the possession of the pledge may be parted with to a stranger, so that the possession of the stranger should be still the possession of the pledgee, possession cannot be so parted with to the pledgor himself; and that if the pledgor receive back possession of the goods pledged, however clear it may be that he was to receive them only as the agent of the pledgee to do something with them on the pledgee's behalf . . . it shall be held that the pledge is at an end. . . . My Lords, I need hardly say that . . . there can be no doubt the pledgee might hand back to the pledgor as his agent for the purpose of sale, as was done in this case, the goods he had pledged, without in the slightest degree diminishing the full force and effect of his security.”

NOTES

In the above case the agreement to sell between Page and Cross was actually antecedent to the advance by, and the pledge of the document to, the appellants, but Lord HERSCHELL, L.C. did not consider that this made any difference to the legal position of the parties. The learned Lord Chancellor said, at p. 72 :—

“ I apprehend that if an owner of goods (for this purpose the case is precisely the same as if the bank had been absolute owners) places his goods for sale in the hands of an agent, and if that agent, for the purpose of implementing an open contract which he has, delivers those goods to the person who has made that contract with him in such a way that upon delivery the sale becomes complete and the obligation to pay the price arises, that is just as much a sale of his principal's goods to that person, and just as much makes the purchaser liable to his principal and liable to be sued by his principal, as if the agent had no contract before the goods were delivered, and had afterwards made the only contract that was ever made.”

In cases like these the banks almost invariably make the pledgor sign a trust receipt when the documents of title are surrendered to him, and it has been argued that such trust receipt constitutes a bill of sale which requires registration in order to be valid, see cases *infra*. The Courts have, however, taken the opposite view. ASTBURY, J., in *re David Allester, Ltd.*, [1922] 2 Ch. 211 explained the whole situation in this way, at p. 216:—

“ In my judgment these letters of trust do not fall within the bills of sale definition at all. The pledge rights of the bank were complete on the deposit of the bills of lading and other documents of title. These letters of trust are mere records of trust authorities given by the bank and accepted by the company stating the terms on which the pledgors were authorised to realise the goods on the pledgees' behalf. The bank's pledge and its rights as pledgee do not arise under these documents at all, but under the original pledge: see *Ex parte Hubbard* (1886), 17 Q. B. D. 690, 697. The bank as pledgee had a right to realise the goods in question from time to time, and it was more convenient to them, as is common practice throughout the country, to allow the realisation to be made by experts, in this case by the pledgors. They were clearly entitled to do this by handing over the bills of lading and other documents of title for realisation on their behalf without in any way affecting their pledge rights.”

Another problem arising in this case is that of dishonesty on the part of the pledgor. It has been held in *Lloyd's Bank, Ltd. v. Bank of America National Trust and Savings Association*, [1938] 2 K. B. 147 that if pledgors were entrusted with documents of title by the pledgee, but instead of selling them pledged them again to another banker, who did not know of the previous pledge, then the first pledge was discharged and the first pledgees had lost their security. This decision was arrived at on the strength of ss. 1 and 2, of the Factors Act, 1889, the first pledgees having constituted the pledgors their mercantile agents. See *supra*, pp. 190 *et seq.*

BILLS OF SALE

RAMSAY v. MARGRETT,

[1894] 2 Q. B. 18

As to what is a bill of sale.

Facts of the Case

Sir Alexander and Lady Ramsay lived in a house which was taken in the husband's name, but of which Lady Ramsay paid

the rent. The bulk of the furniture and effects in the house were the property of the husband, but Lady Ramsay had separate estate of her own, including some of the furniture in the house.

In August, 1892, Sir Alexander was being pressed by some of his creditors, and, to assist him, Lady Ramsay (after consulting her solicitor) agreed to purchase his furniture and effects for £1,700, which was considered to be their full value. She paid this sum to him in two instalments in August, and stipulated that he should give her a receipt for the money. Her solicitor drew up a document which Sir Alexander signed, but the money was actually paid by her before this document was signed. The document took the form of a receipt for the £1,700 in payment of the agreed purchase-money for all the husband's furniture and effects, and ended with the words, "which I hereby acknowledge are now absolutely her property." There was no formal delivery of the goods by Sir Alexander to his wife, and after the purchase, the goods remained, as before, in the house where they continued to live together.

In May, 1893, Lady Ramsay insured the goods against fire in her own name, and in July, 1893, she sent part of them to her own bankers. Later, the defendant, to whom Sir Alexander Ramsay was indebted, levied execution upon the goods still remaining at the house, in respect of a judgment which he had obtained against Sir Alexander. Lady Ramsay claimed the goods, and an interpleader issue was directed to try the right to the goods. The defendant contended that the property in the goods passed to Lady Ramsay by the above form of receipt and that this document ought to have been registered as a bill of sale, because the goods still remained in the possession of Sir Alexander, and that as it was not registered, it was void as against him, under section 8 of the Bills of Sale Act, 1878.

Decision

The **Court of Appeal** held, that notwithstanding the words at the end, the receipt did not form part of the transaction passing the property in the goods to Lady Ramsay, the property having already passed by the prior bargain, and therefore the receipt did not require registration under the Bills of Sale Act, 1878. The majority of the Court also held that Lady Ramsay had a sufficient possession of the goods to take the case out of that Act, because the situation of the goods was consistent with their being in the possession of either the husband or the wife, and therefore the law would attribute the possession to the wife, who had the legal title.

Lord ESHER, M.R., said, at p. 23 :—

" That document " (meaning the receipt) " is not, in fact, a bill of sale—that is, a document by virtue of which alone the property in goods passes from one person to another. But under certain circumstances such a document is, by section 4 " (that is, section 4 of the Bills of Sale Act, 1878) " to be deemed to be a bill of sale. . . . The last authority on the point is the decision of the House of Lords in *Charlesworth v. Mills*, [1892] A. C. 231. It seems to me that the rule as there laid down by Lord HERSCHELL is this: If a document is intended by the parties to it to be a part of the bargain to pass the property in the goods, then, whatever the form of the document may be, even if it be only a simple receipt for the purchase-money, it is, by section 4, to be deemed to be a bill of sale, though it is not so in fact. But, if the document is not intended to be part of the bargain to pass the property in the goods—if the bargain is complete without it, so that the property passes independently of it—then it is not to be deemed to be that which it is not in fact—a bill of sale. That is the test to be applied. If a purchaser of goods asks the vendor for a simple receipt for the purchase-money, is that receipt part of the bargain to pass the property in the goods—if the bargain is complete without it, so that the property passes independently of it—then it is not to be deemed to be that which it is not in fact—a bill of sale. That is the test to be applied. If a purchaser of goods asks the vendor for a simple receipt for the purchase-money, is that receipt part of the bargain to pass the property in the goods? It seems to me it would be absurd to say that it is. When you have paid the price of goods which you buy in a shop and you ask for a receipt for the money, is that receipt part of the bargain to pass the property in the goods? Certainly not. . . . It would be a perversion of the Bills of Sale Act to say that it is. If Lady Ramsay had said to her husband, ' I will not pay you the money until you give me an inventory of the goods with a receipt for the money,' the document would then have been part of the bargain to pass the property, and so indeed might a mere receipt for the money, if she had declined to take the goods until a receipt had been given to her. But that which is not really a bill of sale cannot be deemed to be a bill of sale, if it is not part of the bargain to pass the property in the goods."

NOTES

In *French v. Gething*, [1922] 1 K. B. 236, by a post-nuptial deed a husband gave to his wife certain household furniture in the house in which they were living together. The deed was not registered as a bill of sale. Some years later creditors of the husband obtained

judgment against him and levied execution at the house, but the wife claimed the furniture. It was held (following the above case) that the furniture was not in the possession or apparent possession of the husband within the meaning of section 8 of the Bills of Sale Act, 1878, because the law attributed the possession to the wife, who had the title to it under the deed, and therefore the creditors of the husband were not entitled to claim it.

It should be observed that section 4 of the Bills of Sale Act, 1878, defines a bill of sale, and section 8 prescribes the formalities to be observed on the execution of a bill of sale, and provides that if these formalities are not complied with, the bill of sale is to be void against the trustee in bankruptcy of the person making it, and against a trustee under an assignment for the benefit of his creditors, and against his execution creditors, as regards any goods comprised in the bill of sale which still remain in the possession or apparent possession of the person so making it. Section 8 does not apply to bills of sale given by way of security for money, which are now governed by the amending Act of 1882, but it still applies to all other bills of sale.

MAAS v. PEPPER,

[1905] A. C. 102

Where goods are purchased and let on a hire-purchase agreement, the Court is not bound by the form of the agreement, but is entitled to inquire into the real substance of the bargain, and if it appears that in fact the transaction was a loan on security of the goods, then the agreement will be subject to the provisions of the Bills of Sale Acts.

Facts of the Case

One Mellor entered into a written contract with one Sykes to purchase a freehold hotel with the furniture, etc., for £30,000, of which Sykes agreed to leave £27,000 on mortgage. Mellor had only £1,000 himself, and he asked the appellant, Maas (a wine merchant), to lend him £2,000 on mortgage. The appellant declined to do this, and Mellor refused to give a bill of sale. They then came to an understanding which was carried out as follows. On the day when Mellor was to complete his purchase from Sykes, the appellant went to Sykes and offered to buy the furniture in the hotel for £2,000, saying that otherwise Mellor could not complete his purchase. The appellant paid Sykes £2,000 for the furniture, and Sykes gave him a receipt. The

appellant then went to Mellor, and a hire-purchase agreement was executed by which the appellant let the furniture to Mellor for £2,412 16s., to be paid by instalments, on the terms that the furniture was not to become the property of Mellor until all the instalments had been paid, and in the meantime it was not to be removed from the hotel. At the same time Mellor signed an agreement to buy all his wine and spirits from the appellant until the instalments were paid. The purchase of the hotel was then completed on the same day and Mellor took possession.

After paying some of the instalments, Mellor became bankrupt, and his trustee in bankruptcy (the respondent Pepper) brought an action against the appellant, claiming (1) a declaration that the hire-purchase agreement was void under the Bills of Sale Acts, 1878 and 1882, for want of registration, and that the furniture was vested in the respondent as trustee in bankruptcy; (2) an order for payment to the respondent of £1,730, the value of the furniture. At the trial, Sykes was called as a witness, and said the appellant told him that Mellor was short of money for completion, and that he (the appellant) would lend him some money. The appellant was not called as a witness at all. WRIGHT, J., came to the conclusion that the transaction was really a loan by the appellant to Mellor on the security of the hire-purchase agreement, and was therefore subject to the requirements of the Bills of Sale Acts, and as these were not complied with, he gave judgment in favour of the respondent. The **Court of Appeal** affirmed this decision, and the appellant appealed.

Decision

The **House of Lords** also held that the judgment of WRIGHT, J., was correct, and they dismissed the appeal.

The Earl of HALSBURY, L.C., in his speech, said:—

"I think WRIGHT, J., came to the right conclusion upon a question of fact. It seems to me that the whole of the evidence points in one direction. I do not think the sale to Mr. Maas was a reality. I think the obvious purpose was that Mr. Maas was to lend £2,000, to get the security of the furniture, and yet not to be within the Bills of Sale Acts; that was the whole object as far as this transaction was concerned. Everything raises a very strong presumption that this was a colourable sale. The only thing that would have brought me to a different conclusion would have been if Mr. Maas himself had been called and had given a perfectly clear and credible account of how it was that the original arrangement was completely altered by all the parties, and that he was to become the vendee of these goods. I

do not think he ever was that. It was for those who insisted upon the sale of the furniture being a real and *bona fide* one to prove it."

NOTES

The student should refer to *Helby v. Matthews*, [1895] A. C. 471, illustrated *supra*, p. 192, for the nature of hire-purchase contracts. As the above case of *Maus v. Pepper* shows, contracts may be in this form although the real intention of the parties is a transaction of a different character. The law always looks to the realities and will not be put off by colourable imitations intended to avoid the requirements of statutes. Another example of this kind is *Beckett v. Tower Assets Company*, [1891] 1 Q. B. 638. There the plaintiff was in need of money, and he was also in arrear with his rent. The defendants were prepared to lend him the money he needed provided the following arrangements were made: the landlord levied a friendly distress, and the defendants bought the goods from the broker, and having done so let them on hire to the plaintiff who was to pay £50 by instalments. In the event of instalments not being paid the defendants should have the right to take possession of the goods. This arrangement was carried out, and the defendants bought the furniture and effects of the plaintiff at less than half their real value. Subsequently, when the plaintiff, who had never parted with the possession of the goods, fell behind with his payments the defendants seized the goods, and the plaintiff sued, contending that the seizure was illegal. It was held by the Court of Appeal that this was indeed so. The parties really intended that the beneficial interest in the goods should not pass to the defendants until the hire-purchase agreement was executed; until then they were to hold them in trust for the plaintiff. Therefore the defendants had no title to the goods independently of the hire-purchase contract. That amounted to a bill of sale which, in the absence of registration, was void. The seizure was accordingly illegal.

THOMAS v. KELLY AND BAKER

(1888), 13 App. Cas. 506

A bill of sale by way of security for money is void if it is not in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882.

Facts of the Case

By a bill of sale one Kellond assigned to Thomas (the appellant)

"All and singular the several chattels and things specifically described in the schedule hereto annexed or hereinafter written, together with all other chattels and things, the property of the

mortgagor now in and about the premises known as 119 Shirland Road, Paddington. And also all chattels and things which may at any time during the continuance of this security be in or about the same or any other premises of the mortgagor (to which the said chattels or things or any part thereof may have been removed), whether brought there in substitution for, or renewal of, or in addition to the chattels and things hereby assigned, by way of security for the payment of the said sum of £40 and interest thereon at the rate of 60 per cent. per annum."

Kellond was indebted to Kelly & Baker (the respondents) and they recovered judgment against him and levied execution, in pursuance whereof the sheriff seized Kellond's goods. The appellant then claimed some of the goods under the bill of sale. He abandoned his claim to any goods other than those specifically described in the schedule to the bill of sale, but maintained his claim as to the rest.

Section 9 of the Bills of Sale Act (1878) Amendment Act, 1882, provides that a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void, unless made in accordance with the form in the schedule annexed to the Act.

Decision

The **House of Lords** held that the bill of sale was not made in accordance with the form prescribed by the Act, and was therefore void. The appellants could accordingly not claim the goods, and the respondents were entitled to have them seized and sold.

In the course of his judgment, Lord HALSBURY, L.C., said:—

" My lords, I do not think it can be seriously doubted that the statute did intend to make void absolutely, and not merely against all but the grantor, every bill of sale given by way of security for money unless made in accordance with the form in the schedule to the Act. . . . Further, I think that the 9th section must be construed to enact not only what a bill of sale must contain, but also what it must not contain; so that the statute must be understood to have prohibited bills of sale of personal chattels as security for money to which the form given by that statute is not appropriate. It is, however, true that the form given is so far elastic that the statute does not make every word imperative, but provides that no form shall be permitted except one made 'in accordance with the form in the schedule.' . . . It is obvious that a bill of sale which purports to assign after-acquired property whether in the form of a covenant (its true legal effect) or, as stated specifically in words, as part of the security, is not in accordance with the 'form,' and therefore

void. . . . This bill of sale purports to assign all the chattels specifically described and then . . ." (see words of the bill of sale set out in the facts above). "My lords, it would be impossible to imagine words apparently more designedly contrived to sweep up everything of which the mortgagor might at any time thereafter become possessed. It appears to me that, whatever else was permitted by the bills of sale contemplated by the statute, it never could have been intended that words so wide, whatever legal effect may be given to such words, could have been permitted so as to render it possible for a lender of money to have a claim against all future property, either on the premises upon which the assigned goods then were or on any other premises upon which those goods, or any part of them, might thereafter be. . . . I have, therefore, no difficulty whatever in saying that this bill of sale is absolutely outside the limit of interpretation which can be properly given to the language in the form prescribed by the statute, and consequently in holding that this bill of sale is void."

NOTES

One of the main objects of the Bills of Sale Act (1878) Amendment Act, 1882, is to protect borrowers against moneylenders. It does this by stringent provisions as to the form of the transaction, its attestation and registration. The policy of the Courts is to enforce these requirements strictly.

The fact that a particular transaction, by reason of its nature, cannot be expressed in the form given in the schedule to the above Act, will not affect the position at law, and if the transaction is such as to constitute a security on goods for the payment of money, it will still be void, if not made in accordance with the form in the schedule. (See *Ex parte Parsons, Re Townsend* (1886), 16 Q. B. D. 532.)

On the other hand, if a bill of sale is made substantially in accordance with the form in the schedule, it will be valid, even though it may contain other provisions not inconsistent with that form. Thus, in the case of *Ex parte Stanford, Re Barber* (1886), 17 Q. B. D. 259, a bill of sale of chattels, given as security for money, contained a stipulation by the grantor to insure the goods against fire, and to pay the premiums and, on demand, to produce the receipts for the premiums to the grantee, and that, on default, the grantee might himself insure the property, and that all moneys so expended by him, with interest thereon, should, on demand, be repaid by the grantor, and until repaid should be a charge on the goods. But the bill of sale provided that the goods should not be liable to seizure by the grantee for any cause other than those specified in section 7 of the above Act of 1882, and it was held by the Court of Appeal that this bill of sale did produce the precise legal effect of the form in this schedule, and was not void because it also contained the stipulations as to insurance.

It should be observed that if a bill of sale by way of security for money is not made in accordance with the form in the schedule, it is absolutely void, not merely as regards the goods comprised in it, but also as regards any covenant by the grantor for payment of the principal money and interest, with the result that the grantee will then be entitled simply to the repayment of his money, with interest at 5 per cent., but not to interest at the rate mentioned in the bill of sale, nor will he have the benefit of any charge or security on the goods. (See *Davies v. Rees* (1886), 17 Q. B. D. 408.)

It should be noted that the Bills of Sale Act, 1878, originally applied to all bills of sale, but since the amending Act of 1882 was passed, the position is altered, and now the 1878 Act still applies wholly to absolute bills of sale, but some of its provisions do not now apply to bills by way of security for money. (See the 1882 Act, section 15.) As to the amending Act of 1882, that applies only to bills of sale by way of security for money, and does not apply to absolute bills at all. (See section 3 of the Act, and per FRY, J., in *Swift v. Pannell* (1883), 24 Ch. D., at p. 211.)

See Stevens' Elements of Mercantile Law, 10th Edn., pp. 534 *et seq.*

Re GINGER, Ex parte LONDON AND UNIVERSAL BANK,

[1897] 2 Q. B. 461

Goods comprised in a bill of sale by way of security for money are not exempt from the operation of the possession, order, and disposition clause in bankruptcy.

Facts of the Case

In February, 1896, Ginger, a dairy-farmer, gave to the above bank as security for an advance, a bill of sale over his furniture, stock, cows, calves, horses, etc. The money advanced, and interest, were to be repaid, as to £75 on May 28th, and the balance on August 28th, 1896. The bill of sale was duly registered.

In March, 1896, Ginger gave to the bank, as security for a further advance, another bill of sale over his crops, tenant-right, and goodwill of his farm. This was also registered.

On April 9th, 1896, a bankruptcy petition was presented against Ginger, on which a receiving order was made on the 20th. At that time there had been no default in payment of the principal and interest secured by the two bills of sale, and Ginger was still carrying on his business at the farm. Later, he was adjudicated a bankrupt, and his estate sold as a going concern and the proceeds paid into Court.

The bank was in liquidation and the liquidator applied to the

Court for a declaration that the bank was entitled to the chattels and property comprised in the two bills of sale, and to be paid the proceeds thereof out of the money in Court. The County Court Judge found that the goods comprised in the bills of sale, so far as they formed part of Ginger's trade or business of a farmer, were in his possession, order, and disposition, by the consent and permission of the true owner within the meaning of the Bankruptcy Act, 1883, s. 44 (iii), and that the proceeds of these formed part of the estate of the bankrupt divisible among his creditors. But as to the furniture in the house, and the things fixed to the freehold and the tillages, grass, and crops, he held that the above section did not apply and that the liquidator of the bank was entitled to the proceeds representing these items. The liquidator appealed against the former part of the decision.

Decision

It was held by a **Divisional Court of the Queen's Bench Division** that the County Court Judge was right, and the appeal was dismissed.

In his judgment, VAUGHAN WILLIAMS, J., said :—

" By section 44 of the Bankruptcy Act, 1883, it is provided that all goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, shall be comprised in the property of the bankrupt divisible among his creditors. . . . Apart from the bill of sale, no one would hesitate to say that the possession of the bankrupt here was such as to bring the case within section 44 of the Bankruptcy Act. Then, what difference does the bill of sale make? It is said that, because the Act of Parliament requires a certain form to be used, and prescribes certain consequences of giving a bill of sale, that negatives the presumption that the possession of the grantor is by the consent of the true owner. I do not see why that should be so. The Bills of Sale Acts apply to all classes of persons. The reputed ownership clause of the Bankruptcy Act in effect only applies to traders. It speaks of the goods as being in the possession, order, or disposition of the bankrupt 'in his trade or business.' . . . Here there is a finding of fact by the County Court Judge that the surrounding circumstances were such as to raise the reputation of ownership on the part of the grantor of the bills of sale, and therefore, in my opinion, the grantee was bound to take steps to negative that reputation. In my opinion the decision of the County Court Judge was right, and must be affirmed."

NOTES

The above provision of section 44 (iii) of the Bankruptcy Act, 1883, is now replaced by section 38 (c) of the Bankruptcy Act, 1914.

But in the case of an absolute bill of sale (as distinct from a bill of sale by way of security for money) in respect of which the requirements of the Bills of Sale Act, 1878, are complied with, goods comprised therein are not subject to, or caught by, the operation of this "possession order and disposition clause" in the event of the grantor becoming bankrupt. See 1878 Act, section 20; and *Swift v. Pannell* (1883), 24 Ch. D. 210.

See also under Bankruptcy, *infra*, p. 333 *et seq.*

MARITIME LIENS

**HARMER v. BELL
THE "BOLD BUCCLEUGH"**

(1852), 7 Moo. P.C.C. 267

A maritime lien does not depend upon possession, and is binding on a purchaser for value without notice, unless it has been lost by negligence or delay.

Facts of the Case

On December 14th, 1848, the *Bold Buccleugh* collided with the barque *William*, in the river Humber, the *William* being totally lost. On December 19th, her owners (the respondents Bell and Others) entered an action for damage in the English Admiralty Court against the *Bold Buccleugh*, and her owners, and a warrant of arrest was issued, but the *Bold Buccleugh* had left and gone to Scotland. The respondents then applied to the owners of the *Bold Buccleugh* to give bail to the action, but they declined to do so. Therefore, the respondents commenced a similar action in the Scottish Court of Session, and the *Bold Buccleugh* was arrested at Leith, but released on bail.

By a bill of sale made on June 26th, 1849, the owners of the *Bold Buccleugh* sold her to the appellant Harmer, who had no notice of any claim for the damage to the *William* or of any action in respect thereof.

In August, 1849, the *Bold Buccleugh* returned to Hull and was arrested again under a warrant issued by the High Court of Admiralty in England, and a fresh action was commenced in that Court, the suit in the Scottish Court being

abandoned. The appellant entered an appearance under protest, and by way of defence to the present action, in addition to raising a question as to jurisdiction on the ground of the previous action in the Scottish Court, he also contended that he was a purchaser for value of the *Bold Buccleugh* without notice that there was any unsatisfied claim outstanding against her.

Decision

The **Privy Council** held that the appellant was liable. With regard to the first point, that regarding jurisdiction, the claim was in order, since the proceedings in Scotland had been abandoned. In dealing with the second point as to the appellant being a purchaser for value of the *Bold Buccleugh* without notice, Sir JOHN JERVIS said :—

“ It is admitted that the Court of Admiralty has jurisdiction in a case of collision by a proceeding *in rem* against the ship itself; but it is said that the arrest of the vessel is only a means of compelling the appearance of the owners, that the damage confers no lien upon the ship, and that the owners having appeared, the question is to be determined according to the interests of the party litigant, without reference to the original liability of the vessel causing the wrong. For these propositions, dicta have been referred to, which are entitled to great respect, but which, upon consideration, will be found not to support the propositions for which they were cited . . . the proceeding *in rem*, whether for wages, salvage, collision, or on bottomry, goes against the ship in the first instance. . . . In all proceedings *in rem* . . . the warrant is the same . . . ”

“ But it is further said, that the damage confers no lien upon the ship, and a dictum of Dr. Lushington in the case of *The Volant* ((1842), 1. Wm. Rob. 383) is cited as an authority for this proposition. By reference to a contemporaneous report of the same case (1 Notes of Cases, 503), it seems doubtful whether the learned Judge did use the expression attributed to him by Dr. W. Robinson. If he did, the expression is certainly inaccurate, and being a dictum merely, not necessary for the decision of that case, cannot be taken as a binding authority. A maritime lien does not include or require possession. . . . A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect with the thing, into whosoever possession it may come. It is inchoate from the moment the

claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached. . . . This rule, which is simple and intelligible, is, in our opinion, applicable to all cases. It is not necessary to say that the lien is indelible, and may not be lost by negligence or delay where the rights of third parties may be compromised; but where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced, into whosesoever possession the thing may come."

NOTES

It should be observed that the expression "bill of sale" in this decision has nothing to do with the bills of sale dealt with *supra*, p. 308. In respect of ships a bill of sale is the document by which where the ship must be registered as a British ship on the sale of a vessel the property in it is transferred from the seller to the buyer, see s. 24 (1), Merchant Shipping Act, 1894.

The student should bear in mind that no lien for damage caused by the ship arises unless its owner, by his own negligence or that of his servants, has incurred personal liability at the same time. This has been explained by Sir F. JEUNE, in *The Utopia*, [1893] A. C. 492, 499:—

"No doubt at the time of action brought, a ship may be made liable in an action *in rem*, though its then owners are not, because by reason of the negligence of the owners, or their servants, causing a collision, a maritime lien on their vessel may have been established, and that lien binds the vessel in the hands of subsequent owners. But the foundation of the lien is the negligence of the owners or their servants at the time of the collision, and if that be not proved no lien comes into existence, and the ship is no more liable than any other property which the owners at the time of the collision may have possessed."

Troublesome questions often arise where two or more liens attach to the same ship. As to these, see Stevens' Elements of Mercantile Law, 10th Edn., pp. 549, 550. One question, which had remained doubtful for a long time has recently been decided in *The Inna*, [1938] P. 148. On December 28th, 1937, part of the cargo of the *Inna* exploded in Poole Harbour; owing to the explosion the ship sank and warehouses on shore were damaged. On January 5th, 1938, salvors contracted with the owners to raise the vessel and tow her to Southampton in consideration of a lump sum payment of £1,250. The salvage was completed on January 28th. There therefore attached two liens, one in favour of the owners of the damaged warehouses, and the other in favour of the salvors. On January 26th, the *Inna* was arrested at the instance of the shore property owners, and on February 24th the salvors issued a writ *in rem*. As the sale of the

vessel realised only £578 the question arose as to the distribution of this sum between the two claimants. It was decided by Sir Boyd Merriman, P., that the salvors were entitled to all in priority over the earlier damage claimants, subject to the latter being allowed to recoup themselves for the costs of the arrest. The *ratio decidendi* for this is that but for the activities of the salvors there would have been no *res* in existence to which the maritime lien could attach, and therefore their claim ought to be satisfied first.

CONTRACTS OF SEAMEN

MERCANTILE S.S. CO. v. HALL,

[1909] 2 K. B. 423

Stipulations in an agreement between the master of a ship and the crew, which are inconsistent with the provisions of the Merchant Shipping Act, 1894, are contrary to law.

Facts of the Case

The plaintiffs were the owners of the British steamship *Lena*. The defendant was superintendent of the mercantile marine office at Barry.

In contemplation of a voyage abroad, the master arranged with a crew to serve on board the *Lena* under an agreement which contained (*inter alia*) stipulations entitling the master to make certain deductions from the wages of any member of the crew for not joining at the proper time, or for absence at any time without leave from the ship, or from duty.

The master and the crew attended at the mercantile marine office at Barry to sign the agreement in the presence of the defendant, but the defendant refused to allow this or any agreement containing the above stipulation, stating as his reason for refusing that he was instructed by the Board of Trade so to do, on the ground that it was contrary to law.

Decision

In an action brought by the plaintiffs against the defendant, PICKFORD, J., held that the stipulation in question was contrary to law, and therefore was not permissible, and he said:—

“ The terms of the engagement of seamen are dealt with by a group of sections of the Merchant Shipping Act, beginning with

section 113. That section provides that the master of every ship shall enter into an agreement with the crew in accordance with the Act. Section 114, by sub-section (3) provides: 'The agreement with the crew shall be so framed as to admit of such stipulations to be adopted at the will of the master and seaman in each case, whether respecting the advance and allotment of wages or otherwise, as are not contrary to law' . . . There are no express provisions in that Act prohibiting stipulations of this description; therefore I have to consider whether, if stipulations are not expressly prohibited by the Act, they are contrary to law within the meaning of section 114 if they are inconsistent with the provisions of the Act. I am of opinion that they are, and the question therefore narrows itself to this: are these stipulations inconsistent with the provisions of the Act dealing with the same subject? The provisions of the Act with which they are said to be inconsistent are contained in section 221, sub-section (b) . . . The sub-section provides certain consequences which shall follow upon the offence of absence without leave. The stipulations proposed to be introduced into the agreement also provide certain consequences which shall follow upon the offence of absence without leave, and they are different consequences from those mentioned in the Act. . . . I think, therefore, that these stipulations are inconsistent with the provisions of section 221, and being so, are 'contrary to law' within the meaning of section 114.'

NOTES

The Board of Trade functions in connexion with shipping have now been transferred to the Ministry of Transport, see Ministers of the Crown (Transfer of Functions) Act, 1946.

STILK *v.* MYRICK

(1809), 2 Camp. 317

The duties of a seaman.

Facts of the Case

A ship went on a voyage from London to the Baltic and back. Plaintiff was one of the seamen and his wage was agreed, before the commencement of the voyage, at £5 a month. During the voyage, two seamen deserted. The captain tried to fill their places at Cronstadt, but was unable to do so, and so he entered into an arrangement with the rest of the crew, that they should have the wages of the two deserters divided equally among them, if he could not get two other hands at Gottenburg. He

was unable to get two others, and the remainder of the crew, including the plaintiff, worked the ship back to London.

The plaintiff now sued for his wages, and the principal question was, whether his claim was limited to the £5 per month, originally agreed, or whether he could also recover the extra remuneration as promised by the captain when the two seamen deserted.

Decision

Lord ELLENBOROUGH held that the plaintiff could only recover at the rate of £5 per month, as originally agreed, and in the course of his judgment, he said:—

“ Here I say the agreement” (meaning the agreement made by the captain to pay the extra remuneration) “ is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. If they had been at liberty to quit the vessel at Cronstadt the case would have been quite different; or if the captain had capriciously discharged the two men who were wanting, the others might not have been compellable to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages. But the desertion of a part of the crew is to be considered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration, and that the plaintiff can only recover at the rate of £5 a month.”

NOTES

But if uncontemplated risks arise, the position is different. In *Liston v. Owners of S.S. Carpathian*, [1915] 2 K. B. 42, the plaintiffs were engaged as seamen on a British ship on a commercial voyage to Port Arthur, and back to the United Kingdom. At Port Arthur the outward cargo was discharged and a cargo of oil was taken on board. News then arrived of the outbreak of war between Germany and England, and that the *Karlsruhe*, a German cruiser, was in the vicinity of Port Arthur, and the plaintiffs refused to complete the voyage, on account of the extra risk, unless they received additional remuneration. The master therefore agreed to pay them an extra £12 each to take the ship home. It was held by Lord COLERIDGE, J., that the risks of war not being contemplated when the agreement was made

for the commercial voyage, and the risks of capture and also of danger from mines being matters which might reasonably be taken into consideration, the plaintiffs were discharged from their original duty to proceed on the voyage, and the owners were liable to pay them the extra remuneration promised by the master. (See also *Palace Shipping Co., Ltd. v. Caine*, [1907] A. C. 386.)

Under the Merchant Shipping (International Labour Conventions) Act, 1925, where a ship is wrecked or lost, the members of the crew are entitled to wages during a period of two months. This is well illustrated by the following cases.

In *Ellerman Lines, Ltd. v. Murray*, [1931] A. C. 126, the respondent was employed as quarter-master and able-bodied seaman on board the appellants' vessel, the *Croxteth Hall*. On February 27th, 1929, the ship was wrecked off Flushing, and the respondent claimed two months' wages from that date. The appellants denied liability on the ground that under the agreement the employment would have terminated on March 10th, that is after two weeks. But it was held by the House of Lords that the owners were liable to pay the contract wages until April 27th, because the obligation imposed on them by s. 1 of the Act was absolute. Only if the unemployment did not result from the wreck or if the seaman might have obtained other suitable work were the owners excused under s. 1 (2), of the Act. Where some time elapses between the casualty and the abandonment of the venture the latter date determines the beginning of the statutory two months. Thus in *The Terneuzen*, [1938] P. 109, the ship stranded on January 27th, but the salvors did not give up refloating efforts until May 5th, on which day the crew was paid off. It was held that the two months ran from May 5th, this was the day when the ship became, legally speaking, a wreck, because it was certain that the voyage would not be continued.

On the other hand, in *Barras v. Aberdeen Steam Trawling and Fishing Co.*, [1933] A. C. 402, the plaintiff had a six months' contract as chief engineer on the defendants' trawler. When making the port during that period the trawler collided with another vessel. Though she reached port under her own steam she had to be dry-docked for a fortnight in order to repair the damage caused by the collision. During that time the crew, including the plaintiff, were paid off, but later re-engaged. It was held that the plaintiff had no right under the Act because the venture had not been abandoned, but only interrupted, and in these circumstances s. 1 of the Act did not apply.

See Stevens' Elements of Mercantile Law, 10th Edn., pp. 573, 574.

STOCK EXCHANGE TRANSACTIONS AND THE GAMING ACT

(1) **THACKER v. HARDY**

(1878), 4 Q. B. 685

(2) **THE UNIVERSAL STOCK EXCHANGE, LTD. v.
STRACHAN,**
[1896] A. C. 166

Stock Exchange transactions and the Gaming Act, 1845.

Facts of the First Case

The plaintiff was a stockbroker and the defendant was, to his knowledge, a speculator, and he employed the plaintiff to speculate for him on the Stock Exchange. The defendant never expected, or intended, to accept actual delivery of the stocks which the plaintiff might buy for him, nor to deliver what the plaintiff might sell for him, and the plaintiff knew this; but the defendant knew that he incurred the risk of having to accept or deliver, as the case might be, and was content to run that risk, expecting that the plaintiff would be able to arrange matters so as to render nothing but differences actually payable to or by the defendant, and the plaintiff knew that unless he could arrange matters in that way, the defendant would be unable to pay for what was bought for him, or to deliver what was sold for him.

The plaintiff now sued the defendant for commission, and for an indemnity in respect of certain contracts into which he had entered on the instructions of the defendant. The defendant pleaded (*inter alia*) that the transactions were gaming or wagering transactions within the Gaming Act, 1845, and therefore he was not liable. LINDLEY, J., held that they were not gaming or wagering transactions, and that the plaintiff was entitled to recover, and the defendant appealed.

Decision in the First Case

The Court of Appeal affirmed the judgment of LINDLEY, J. In his judgment, COTTON, L.J., said:—

"I will assume that the plaintiff was in a certain sense acting as principal; nevertheless there was no gaming or wagering in

the contract. The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way, A. will lose, but if it turns out the other way he will win. But that is not the state of facts here. The plaintiff was to derive no gain from the transaction ; his gain consisted in the commission which he was to receive, whatever might be the result of the transaction to the defendant. Therefore the whole element of gaming and wagering was absent from the contract entered into between the parties. . . . The contract was simply this: the defendant authorised the plaintiff as his agent to enter into contracts for the purchase of stock, of such an amount that the parties must have known that the defendant did not intend to take it up, but that he meant to arrange matters in another way. I do not think that this transaction is avoided by the Statute against gaming and wagering."

Facts of the Second Case

In 1893 and 1894 the appellants bought from and sold to the respondent various stocks and shares at the "tape prices" of the day. Bought and sold notes were made out in each transaction, stating that the appellants acted "as principal or jobber" and subject to the terms printed on the back. The terms of business (which were signed by the respondent) contained the following statements (*inter alia*) :—

"2. Every purchase or sale contracted by the company" (the appellants) "is a *bona fide* transaction for delivery on a specified settling day, and the company is always prepared, and by means of its capital able to deliver or take up any stock it may at any time have bought or sold, and the contracts entered into by the company are not contracts of gaming or wagering."

"3. The company charges no commission or fees of any kind, but charges a fixed rate of interest of 5 per cent. per annum on the purchase-money of all stocks computed from date of purchase until completion. The buyer to receive from the seller all dividends falling due while the account is ensuing, and the buyer paying all expenses of transfer of stocks."

The transactions with the respondent were for very large amounts and in no instance were stocks or shares ever delivered. During the transactions the respondent handed to the appellants certain securities for the performance of his contracts. He now sued them to recover these securities, alleging that the contracts were gambling transactions for differences. At the trial the jury found that the whole of the transactions were gambling transactions.

Decision in the Second Case

The **House of Lords** on appeal held that the plaintiff was entitled to the return of the securities, and Lord HERSCHELL said :—

“ I think the character of the documents themselves, coupled with the nature of the transactions entered into, the position of the parties who entered into them, and other circumstances which I need not detail, raised a question for the jury whether these were real transactions of commerce or whether they were a mere gambling for differences. I think it is impossible to say that there was no evidence to go to the jury upon the point.

“ My lords, it has been said that wherever a contract is entered into between two parties containing an obligation under any circumstances to cause property to pass from one to another, whatever else there may be in the contract, and although neither of the parties contemplated that that provision should ever become operative, yet, if it ever may become operative, the contract cannot be by way of gaming and wagering . . . the purpose of inserting the provision creating an obligation being only to cloak the fact that it was a gambling transaction, and enable them to sue one another for gambling debts. The proposition contended for by the learned counsel for the appellants would really lead to that result, and I should require much consideration before I gave my assent to a proposition involving such consequences.”

NOTES

Other cases relating to transactions in shares were : *Forget v. Ostigny*, [1895] A. C. 318, in which the case of *Thacker v. Hardy* was followed ; and *Richards v. Starck*, [1911] 1 K. B. 296 in which, on the other hand, the contracts were held to be gaming and wagering contracts.

In *Carll v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, illustrated *supra* p. 11, one of the defences was that the contract, if any, was a wager, and therefore illegal, but the Court held that this was not so.

Transactions in or relating to future prices of any commodities, such as oils, cotton, foodstuffs, etc., are subject to the same considerations.

BANKRUPTCY

ACTS OF BANKRUPTCY

Re CARL HIRTH, Ex parte THE TRUSTEE,
[1899] 1 Q. B. 612

A transfer by a trader of his business may sometimes amount to an act of bankruptcy.

Facts of the Case

In September, 1896, Bendit Brothers commenced an action against Hirth, and on December 21st, 1897, they obtained an injunction against him with costs, which came to £467 15s. 2d. He did not pay the same.

On December 9th, 1897, Hirth converted his business of a wholesale fancy jeweller into a limited company registered under the name of Hirth & Co. Ltd., with a nominal capital of £3,000. By the articles, Hirth and an uncle were to be the first directors, and the uncle was to be at liberty to delegate his powers to Hirth, who was also to be the first chairman and managing director. Shortly afterwards the uncle resigned as a director.

By an agreement dated March 7th, 1898, Hirth agreed to sell his business to the company for £2,000, the company to allot to him or his nominees 2,000 fully paid shares, and to undertake to discharge his debts and liabilities in relation to the business, and the agreement provided that the business should be deemed to have been carried on on behalf of the company as from the previous December 1st. The agreement was duly filed at Somerset House, and was confirmed at a meeting of the company, and the 2,000 shares were allotted to Hirth's nominee, and Hirth was also appointed secretary *pro tem.* There were no other shareholders except the seven signatories of the memorandum of association.

On May 3rd, 1898, Bendit Brothers served a bankruptcy notice on Hirth in respect of the costs due to them, and, upon his non-compliance with the notice, they presented a bankruptcy petition against him, and on May 27th a receiving order was made against him. From his statement of affairs it appeared that his liabilities were £2,204, and assets nil.

On May 25th, 1898, the company passed a resolution to wind

itself up and a liquidator was appointed, who sold the assets of the company and had a sum of between £300 and £400 in hand, which was insufficient to meet the company's liabilities.

In August, 1898, Hirth's trustee in bankruptcy applied to the Court for a declaration that the transfer by Hirth of his business to the company was a device to defeat his creditors, and that the business formed part of the property of the bankrupt, and for an order on the liquidator to hand over the assets of the business in his hands. WRIGHT, J., refused the motion, and the trustee in bankruptcy appealed.

Decision

The **Court of Appeal** held that the transfer by Hirth of his business to the company was fraudulent and an act of bankruptcy under the Bankruptcy Act, 1883, section 4 (1) (b), that the title of the trustee in bankruptcy dated back to the date of the transfer, under section 43, and that the liquidator was bound to hand over to the trustee any assets forming part of or representing the business at the time of the transfer.

In his judgment, LINDLEY, M.R., said :—

“ There cannot be the slightest doubt that so far as Hirth was concerned he had recourse to this scheme to defeat the people who were suing him, and who ultimately got an order against him for more costs than he could pay. Let us see how the matter stands. The section which lies at the foundation of this application, which is section 4 of the Bankruptcy Act 1883, says nothing about void and voidable, but says that certain transactions shall be acts of bankruptcy. Pausing there for a moment, it is impossible to say that because a deed, or a sale, or a conveyance is by that section made an act of bankruptcy, it is then and there void and of no effect. That is obvious, because although a man may commit an act of bankruptcy, he may never be adjudicated a bankrupt upon it; and of course if he is not, all this discussion as to acts of bankruptcy and as to void and voidable is beside the mark. . . . I pass now to the sections which have ultimately to be considered, namely, the sections which deal with the property of a man who has committed an act of bankruptcy. The first section which is of any importance is the 43rd, which embodies what is called the doctrine of relation back. Mr. Hirth having been adjudicated a bankrupt upon a petition which was presented on May 12th, 1898, his bankruptcy relates back to the transaction of March 7th, 1898, if that was, as it clearly was, a fraudulent conveyance within the meaning of the 4th section of the Bankruptcy Act, 1883. . . . We have, therefore to consider what is the position of a trustee who finds that there has been a fraudulent conveyance, which is an act of bankruptcy, and

who elects to impeach the transaction, and demands back the property from the person in whose possession it is. What is the answer to that? It appears to me that there is absolutely no answer at all except this: that there are certain provisions in the Bankruptcy Act which relate to what are called protected transactions; and of course, if a transaction is protected by those provisions, then the trustee cannot enforce that claim. However, we need not trouble ourselves about them. The facts exclude the application of those sections."

NOTES

The Bankruptcy Acts now in force are those of 1914 and 1926, the former being the principal Act, and the relevant sections in that Act dealing with the points raised in this case are: section 1 (1) which defines the acts of bankruptcy including, in par. (b) "if in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof"; section 37 (as to the relation back of the trustee's title); and section 45 (as to certain protected transactions). See Stevens' Elements of Mercantile Law, 10th Edn., pp. 598 *et seq.*

Re Simms, [1930] 2 Ch. 22, is an illustration of an act of bankruptcy: One Simms was a builder with heavy liabilities, *inter alia* an overdraft with Lloyds Bank. Simms formed a limited company and transferred nearly all his assets to the company in consideration of 17,000 £1 shares. About the same time Simms' overdraft on Lloyds Bank was paid off by a transfer from a new account opened by the bank in favour of the company. The latter gave the Bank a debenture by way of security. Upon hearing of these transactions the creditors of Simms began to press and some of them were paid off. But when a few weeks later Simms failed to comply with a bankruptcy notice, a petition was filed and a receiving order was made. It was held that the transfer of the assets to the company was a fraudulent transfer and an act of bankruptcy, and that the trustee's title related back and overrode that of the company, so that the latter was bound to account to the trustee for the assets it had received from the bankrupt. Transactions like the present one must necessarily result in delaying the creditors; moreover the substituted assets, the shares in the company, were not equivalent to the assets transferred. On the other hand, in *Re Harris* (14 Man. 127), a conveyance to a company for debentures was upheld as it was thought that the debentures provided something as a consideration which the creditors could reach just as easily as the assets transferred.

In the case of *Re Simms* (above), CLAUSON J., after considering various cases, said:—

"The result of these authorities appears to me to be that a transfer by a debtor of substantially the whole of his property, whether by way of charge or by way of sale, will be an act of bankruptcy, if the necessary consequence of the transfer will be to defeat or delay his creditors."

If the transfer does not involve substantially the whole of the debtor's property, it will then be necessary to prove that the transfer was in fact fraudulent.

The case of *Salomon v. Salomon & Co., Ltd.*, [1897] A. C. 22, dealt with on p. 144 should be contrasted. In that case there was no question of any intention to defraud creditors, nor was the transfer of Salomon's business a fraudulent one.

Where a transfer by a debtor of his property is held to be an act of bankruptcy, and comes within the period of the relation back of the title of the trustee in bankruptcy, a *bona fide* purchaser for value without notice of the fraud will not have any right to retain the property as against the trustee in bankruptcy. (See *Re Gunshbourg*, [1920] 2 K. B. 426.)

CROOK v. MORLEY,

[1891] A. C. 316

Acts of bankruptcy :—*The effect of a notice by a debtor to his creditors that he is about to suspend payment of his debts.*

Facts of the Case

On December 2nd, 1889, a debtor sent to his creditors a circular worded as follows :—

“ Dear Sirs,—Being unable to meet my engagements as they fall due, I invite your attendance at the Guildhall Tavern, Gresham Street, City, on Wednesday next at 3 p.m., when I will submit a statement of my position for your consideration and decision.

“ Yours obediently,
“ JOHN CROOK.”

On the Wednesday (December 4th) the creditors met, and the debtor offered them a composition of 2s. 6d. in the £, which they refused.

The respondents (I. and R. Morley), who were creditors for £108, filed a petition in bankruptcy against the debtor, and the Registrar made a receiving order, holding that the circular was an act of bankruptcy within section 4 (1) (h) of the Bankruptcy Act, 1883.

Section 4 of that Act enumerated the acts of bankruptcy and the one described in sub-section (1) (h) was as follows :—

“ If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend payment of his debts.”

The **Court of Appeal** affirmed the decision of the Registrar, and an appeal was then made to the House of Lords.

Decision

The **House of Lords** also upheld the Registrar, and dismissed the appeal.

Lord WATSON said :—

“ The Bankruptcy Act, 1883, does not prescribe any form of words for a notice under section 4 (1) (h). It therefore appears to me that any notice will be sufficient for the purposes of sub-section (h) which is expressed in terms calculated to convey to its recipients the information that their debtor has suspended or is about to suspend payment of his debts. . . . In this case, by the circular of the 2nd of December, 1889, the debtor announces to his creditors that he is unable to meet his ‘ engagements as they fall due,’ which plainly imports that he can no longer continue to pay his debts in ordinary course. He then invites them to meet him two days afterwards, at an hour and place specified, ‘ when I will submit a statement of my position for your consideration and decision.’ In my opinion, these words are confirmatory of the intimation conveyed in the first part of the circular, because they suggest that the sender will not be able to resume payments, or to carry on his business unless the creditors agree to accept a composition. I think that a circular in these terms conveys a distinct assurance to the creditors who receive it that their debtor will hold his hand and will make no payments on account of his business except such as are absolutely required for its preservation.”

NOTES

The above provision of section 4 (1) (h) of the Act of 1883 is now replaced by section 1 (1) (h) of the Bankruptcy Act, 1914.

In *Clough v. Samuel*, [1905] A. C. 442, where a stockbroker who was insolvent, told some of his Stock Exchange creditors that he would have difficulty in paying them at the approaching settlement day, and suggested that they might wish to close their accounts with him, it was held by the House of Lords (Lord MACNAGHTEN dissenting) that that did not amount to a notice of his intention to suspend payment of his debts and was not an act of bankruptcy.

But in *Re a Debtor*, [1929] 1 Ch. 362, at an interview between a debtor and the managing clerk of a firm of solicitors representing a Swiss firm who were creditors, the debtor stated that bankruptcy proceedings were pending against him in Switzerland, that he proposed to call a meeting of his Swiss creditors and to offer them a composition of £1,000 in settlement of all his liabilities on condition they released certain goods in England valued at £800, and that he would then make that up to £1,000, but that beyond that sum he had not a single penny. He added that if the Swiss creditors accepted that composition he would offer his English creditors 5s. in the £1 but that otherwise he would not

have any objection to any of his English creditors filing a petition in bankruptcy. It was held that these verbal statements amounted to a notice by the debtor that he had suspended payment of his debts, and that as the solicitor's managing clerk was the representative of one of the creditors, it was a notice to a creditor within the meaning of the Act of 1914, section 1 (1) (h), and was an act of bankruptcy.

PROPERTY DIVISIBLE AMONG CREDITORS

Re GINGER, Ex parte LONDON AND UNIVERSAL BANK,

[1897] 2 Q. B. 461

The possession, order and disposition clause in bankruptcy, in relation to bills of sale by way of security.

The facts and decision in this case will be found set out on page 316, to which reference should be made.

NOTES

Sect. 38 (1) of the Bankruptcy Act, 1914, is designed to bring into the net of the trustee property of which the bankrupt appears to be the owner though he is not so in fact. For reasons of policy the clause is confined to property in the bankrupt's possession in the way of his trade or business (Stevens' Elements of Mercantile Law, 10th Edn., p. 614).

The possession, order and disposition clause does not apply where there is no reputation of ownership, as where there is a well-known custom for a trader to have in his possession, goods belonging to someone else. Thus, in the case of *Ex parte Turquand, Re Parker* (1885), 14 Q. B. D. 636, it was held that there was a well-known custom for hotel-keepers to hire the furniture for hotels; and therefore on the bankruptcy of a hotel-keeper, not only is the trustee in bankruptcy debarred from claiming hotel furniture which has been hired from someone else, but also he cannot claim any such furniture in respect of which the bankrupt has given a bill of sale by way of security for money.

It is quite obvious that there are many cases where persons in trade have goods in their possession in the way of their trade or business as an essential part of their business and under such circumstances that no one could suppose that they were the property of the bankrupt, as for instance in the case of a garage proprietor. It is his business to garage other persons' cars, and also to have cars on sale or return, and therefore on the bankruptcy of a garage proprietor, the possession, order and disposition clause, now contained in section 38 (c) of the Bankruptcy Act, 1914, would not apply to such cars.

Whenever that clause does apply, and the trustee claims goods which in fact belong to someone else, the true owner is entitled to prove as a creditor in the bankruptcy for the value of the goods. (See *Re Button*, [1907] 2 K. B. 180.)

Re WALLIS, Ex parte JENKS,
[1902] 1 K. B. 719

A trustee in bankruptcy takes the property of the bankrupt subject to all equities binding on the bankrupt.

Facts of the Case

In March, 1901, Wallis deposited a policy of assurance on his own life with his wife as security for money lent. No notice of this equitable charge was given to the assurance society. In October, 1901, a receiving order was made against Wallis on his own petition, and he was adjudicated bankrupt, and on October 16th, the Official Receiver gave notice of the receiving order to the assurance society, and later Jenks was appointed trustee in the bankruptcy. Jenks now claimed, as against the wife, to be entitled to the policy, as part of the property of the bankrupt, free from incumbrances.

Decision

WRIGHT, J., held that the trustee was only entitled to the policy on payment to the wife of what was due to her under her security, and in his judgment, he said:—

“ It is plain that before the bankruptcy there was a good equitable deposit of this policy for value by the bankrupt with his wife. No doubt the general rule is that, as between several assignees or incumbrancers of a chose in action, the assignee or incumbrancer who first gives notice obtains priority. But the trustee in bankruptcy is not an incumbrancer for value. Under the bankruptcy laws he is a statutory assignee, and this policy vested in him subject to all equities existing at the date of the commencement of the bankruptcy. Therefore the trustee could not, by giving notice to the assurance office, deprive the bankrupt's wife of her rights as an equitable mortgagee of the property. He can only have the policy on payment to the wife of what is properly due to her under her security.”

NOTES

This case was followed in *Re Anderson*, [1911] 1 K. B. 896. (See per PHILLIMORE, J., at p. 903.)

EFFECT OF BANKRUPTCY ON ANTECEDENT TRANSACTIONS**Ex parte TAYLOR, Re GOLDSMID**
(1886), 18 Q. B. D. 295

In order to constitute a fraudulent preference in bankruptcy, a payment or transfer of property by a debtor to a creditor must be made with a view to giving a preference to the creditor.

Facts of the Case

Goldsmid was a stockbroker, and he was one of three trustees of his father's will. One of the other trustees was Taylor, who was also Goldsmid's solicitor. His two co-trustees allowed some bonds forming part of the trust property to remain in the sole custody of Goldsmid, and in 1884 it was discovered that some of them were missing and his co-trustees called on him to give them an indemnity against liability. Goldsmid therefore, in March, 1884, by deed, covenanted with Taylor to pay the sum of £3,000 (the estimated amount of the loss), and assigned as security his interests under the wills of two aunts. He did not pay this £3,000.

In October, 1884, Goldsmid misappropriated some more bonds belonging to his father's estate, and on March 23rd, 1885, he executed another deed in favour of Taylor, whereby, in consideration of the said sum of £3,000, and a further sum of £17,000 stated to be due by him to Taylor, he assigned to Taylor his own interest under the will of his father by way of security, and also charged the property comprised in the earlier deed of March, 1884.

On March 26th, 1885, Taylor discovered that Goldsmid had forged transfers of certain investments representing the sale-proceeds of securities of another trust fund of which Taylor was also a trustee, and which Taylor had instructed Goldsmid, as a broker, to realise and to reinvest the proceeds. Taylor threatened that if Goldsmid did not pay the money at once he would summon him for embezzlement and on the same day, March 26th, 1885, Goldsmid thereupon gave Taylor a cheque for £3,000, which was duly cashed.

On March 28th, 1885, Goldsmid committed an act of bankruptcy by absconding; on April 8th, a bankruptcy petition was presented against him; and on the 21st he was adjudicated a bankrupt. His trustee in bankruptcy applied to the Court to set aside the payment of the £3,000 by Goldsmid to Taylor, on two

grounds, namely :—(1) that the payment amounted to a fraudulent preference, and (2) that the deed of March 23rd, 1885, was a fraudulent preference, and an act of bankruptcy, and that Taylor received the payment of £3,000 with notice of that act of bankruptcy.

Decision

The Court of Appeal held that the contentions of the trustee were not substantiated and dismissed the application.

LOPES, L.J., said :—

" Every one who studies section 48 " (the section of the Bankruptcy Act, 1883, which dealt with fraudulent preferences, now s. 44, of the Act of 1914) " must come to the conclusion that the animus with which the particular thing is done by the debtor is an essential element in considering whether it is a fraudulent preference. The mere making of a preferential payment is not a fraudulent preference. The substantial motive of the debtor in making it must be looked at. If the substantial motive is to prefer the creditor, the payment is a fraudulent preference. If the substantial motive is reparation for past wrong, or to avoid evil consequences to the debtor himself, the payment is not a fraudulent preference. Applying these tests to the present case, I am clearly of opinion that the bankrupt did not make the payment of the £3,000 with a view of preferring Taylor, but to avoid the evil consequences to himself of an exposure of his wrongdoing. It is said, however, that the execution of the deed of the 23rd of March, was a fraudulent preference and an act of bankruptcy. I am clearly of opinion that it was not, for I do not think that section 48 applies to the state of things which then existed, the relation of debtor and creditor not existing between the bankrupt and Taylor. The transaction amounted to a restitution of trust funds which had been misappropriated by the bankrupt, and the case of *Ex parte Stubbins* (1880), 17 Ch. D. 58, established this : that ' if a debtor on the eve of bankruptcy voluntarily makes good trust money which he has misappropriated, the payment cannot be set aside as a fraudulent preference of the trust estate.' Moreover, it is impossible to say that the bankrupt executed the deed ' with a view ' to prefer a creditor, even if Taylor could be regarded as a creditor."

NOTES

In the case of *Sharp v. Jackson*, [1899] A. C. 419, a trustee had committed breaches of trust and was insolvent. By a deed executed on the eve of his bankruptcy he conveyed an estate to make good the breaches of trust, without any pressure or request by the beneficiaries. The deed recited the breaches of trust and stated that it was executed in order to shield the trustee from liability to proceedings. It was held, by the House of Lords, that the deed was not a fraudulent preference, the

trustee's object being to shield himself from the consequences of his breaches of trust, and not to prefer anyone. Likewise, it was decided in *Re Conley* (1938), 54 T. L. R. 641, that payments into a banking account in order to reduce an overdraft and thus releasing securities deposited by third parties were not fraudulent preferences, because persons depositing securities were not creditors within the meaning of the Acts.

See also Stevens' Elements of Mercantile Law, 10th Edn., p. 623.

On the other hand, *Re Cohen*, [1924] 2 Ch. 515, should be noticed. In that case Cohen ordered goods from Snow & Co. on June 29th. The invoice was dated at Cohen's request July 10th. On July 20th Cohen, fully realising his insolvency, sent cheques to Snow & Co. and to 107 other creditors in settlement of their several accounts ; the cheques were post-dated July 31st. On July 30th Cohen paid Snow & Co. the invoice price in cash, the latter not knowing anything of their debtor's insolvency. On July 31st Cohen gave notice of suspension of payments and after a creditor's petition on August 3rd, Cohen was adjudged bankrupt on August 30th. The trustee then claimed against Snow & Co. a refund of the money they had received from the bankrupt ; he contended that that payment constituted a fraudulent preference within the meaning of s. 44, Bankruptcy Act, 1914, which had replaced s. 48 of the 1883 Act. The Court of Appeal held that the trustee was entitled to the money.

WARRINGTON, L.J., said, at p. 538 :—

" What is the proper inference to be drawn from these facts ? The payment was purely voluntary. No threat of proceedings had been held out by the appellants. No special consequences of an unpleasant nature, such as those the effect of which was considered in *Sharp v. Jackson*, from the non-payment of the debt were to be apprehended. It was not long overdue. The debtor had only ten days earlier taken the step of sending to the 108 creditors post-dated cheques all payable on the same day—July 31—thus putting them all on an equality. Then on July 30, at a time when he must have already determined to give the notice of suspension actually given on the next day, he selects the particular creditor and pays him in full with money which but for such payment would have been distributed amongst the creditors generally. The conclusion seems to me to be inevitable. The payment being purely voluntary and the circumstances attending it being what I have described, I must and do infer that, for some reason or another of which we are ignorant, or for no definite reason in fact and for no other motive, he selected the particular creditors for preferential treatment, and therefore made the payment with a view to preferring them. I can find no rule of law which prevents me from drawing what seems to me an obvious inference.

" The case is a peculiar one, and it must not be supposed that it will be any authority for questioning the validity of a payment of a debt made in the ordinary course of business by a man who knows

he is at the time insolvent, but who may well make such payments in the hope of keeping his business on foot for a time and perhaps even of passing safely through the period of danger. Such payments have been held not to be fraudulent under the provisions of the section, and I desire to throw no doubt on the correctness of such decisions."

PROTECTED TRANSACTION

**Re SEYMOUR,
EX PARTE THE TRUSTEE,**
[1937] Ch. 668

Circumstances in which payments by a bankrupt become protected transactions.

Facts of the Case

The debtor had two accounts with Barclays Bank, Ltd., one at their Edgware Road Branch, which was overdrawn to the extent of £240 and guaranteed by a friend, and the other at the Marble Arch Branch, which was overdrawn to the extent of £2. On March 17th, 1936, a petition in bankruptcy was served on the debtor, and on May 6th he borrowed £300 from moneylenders, paid off the overdraft on the Edgware Road Branch in order to relieve his friend from the guarantee; the rest he paid into his account with the Marble Arch Branch. In December the debtor was adjudicated bankrupt, whereupon the trustee claimed that he was entitled to the £240 paid to the Bank; he contended that his title related back to March 17th, which was the date of the act of bankruptcy. But the Bank contended that it was a protected transaction.

Decision

It was held that the payment was a protected transaction within the meaning of s. 45, of the Bankruptcy Act, 1914.

In the course of his judgment CLAUSON, J., said, at p. 672:—

"The bank's contention that s. 45 is a protection to them seems to me to be correct and to be a complete answer to the trustee's claim. The trustee bases his claim on the provisions of the Act, which make his title to the money, with which the bankrupt paid the bank, relate back to a date antecedent to the date of the payment: the trustee, in other words, can establish his claim only by referring to and invoking the aid of the Act: but s. 45 seems to me to say in plain terms that if (as is admittedly the case here) the two conditions are complied with (i) that the payment is made before the receiving order and (ii) that the payee has no notice of any act of bankruptcy, the Act is not to be invoked in support of a claim

to invalidate the payment. If the trustee cannot invoke the Act, his case must, as it seems to me, fail. The section seems to me plain: the circumstances are such as to bring its protective operation into force; and the bank has, in my view, a perfectly good defence, by virtue of the section, to the claim put forward by the trustee."

NOTES

By s. 45 any payment by the bankrupt to any of his creditors is protected provided that "the payment takes place before the date of the receiving order, and that the person (other than the debtor) has not at the time of the payment notice of any available act of bankruptcy committed by the bankrupt before that time."

Likewise, where the money with which the payment was made had never formed part of the bankrupt's estate, the trustee had no claim to it. *Re Drucker*, [1902] 2 K. B. 237, £300 was paid to the creditor, who had presented the petition, on condition that the petition should be dismissed, and this was done. The money had been advanced to the debtor by his solicitor, and the latter had received security from the former. Later the debtor was adjudicated bankrupt, and the trustee claimed the money. It was held by the Court of Appeal that he had no claim to it, since the £300 was impressed with a trust, so that it could not be applied to any other purpose than paying the said creditor, and that it consequently did not form part of the bankrupt's general assets.

On the other hand, where that is not so, and where the payee has notice of the act of bankruptcy the transaction is not protected. Thus *Re Simms*, [1930] 2 Ch. 22, the facts of which are given *supra*, p. 330, the knowledge of the paying debtor was held to be that of the company which, after having been formed by him, received payment, and the latter could not claim the protection of the Act. It made no difference that the parties honestly thought that the whole transaction, that is the transfer of the debtor's property to the company, was in the best interest of the creditors.

See Stevens' *Elements of Mercantile Law*, 10th Edn., p. 625.

PROOF OF DEBTS

HARDY v. FOTHERGILL

(1888), 13 App. Cas. 351

Debts provable in bankruptcy.

Facts of the Case

By a lease of certain property granted in January, 1833, for a term of 50 years, 7 months, and 22 days, the lessees covenanted well and sufficiently to repair all buildings, etc., and to yield them

up at the end or sooner determination of the term in that condition. By an indenture of July 19th, 1873, the premises comprised in the lease were assigned to Fothergill and Hankey for the residue of the term and they covenanted to perform the covenants of the lease and to indemnify the lessees in respect of the same.

On June 5th, 1875, Fothergill and Hankey filed a petition in bankruptcy. Their affairs were liquidated by arrangement under the Bankruptcy Act, 1869, and on October 25th, 1875, Fothergill obtained his discharge. The lessees under the lease were not scheduled as creditors by Fothergill and Hankey, and no notices were sent to them, nor did they make any claim or tender any proof in respect of the liability of Fothergill and Hankey under the covenant of indemnity.

In February, 1885, the lessor's representatives brought an action against the lessees' representatives (the appellants, Hardy and Another) for damages for breach of the covenants to repair the premises and yield them up in repair, and in such action the appellants brought in Fothergill as a third party, claiming indemnity against him under his covenant in the deed of July 19th, 1873. He contended that having obtained his discharge in the liquidation, he was freed from liability.

Decision

The **House of Lords** held that the liability of Fothergill was a liability which was provable in bankruptcy under section 31 of the Bankruptcy Act, 1869, and therefore Fothergill was now released from the liability, and they affirmed the judgment of the Court of Appeal.

In doing so, Lord HALSBURY, L.C., said:—

“ The question is whether the liability of Mr. Fothergill, whose liquidation took place 8 years before the lease had come to an end, continued notwithstanding that liquidation—equivalent in this respect to bankruptcy—and makes him liable to be sued for a breach of the covenant to which I have referred. That question in turn depends upon whether it is a liability which, in the language of the statute, can be fairly estimated . . . I do not, therefore, see why, if any contingent liability can be valued, this cannot be valued, and the introduction of the adverb ‘fairly’ giving a jurisdiction to the Court to decide whether in particular cases a liability could not be ‘fairly’ valued, seems to me to involve the principle that all liabilities, subject to the express exceptions enacted by the statute, were intended to be included, but that in the one case where the Court should adjudicate that the liability was such that at that time it could not be fairly estimated, then and then only should the liability continue.”

And Lord MACNAGHTEN said :—

" I think the liability in question was, according to the true construction of section 31, a liability provable in bankruptcy, and therefore a liability from which Mr. Fothergill was released by the liquidation proceedings."

NOTES

The Bankruptcy Act, 1869, was repealed by the Act of 1883, which in turn has been replaced by the Act of 1914, and section 30 of that Act now deals with debts provable in bankruptcy, and its provisions are substantially the same as those contained in section 31 of the Act of 1869. See Stevens' Elements of Mercantile Law, 10th Edn., pp. 644 *et seq.*

Re TAYLOR, Ex parte NORVELL,

[1910] 1 K. B. 562

Right of set-off in bankruptcy.

Facts of the Case

Taylor was a builder engaged in building nine houses at Halifax. Norvell was a joiner and was doing the joinery work for these houses under a contract by which he was to be paid by instalments on the certificate of the architect. He had received a certificate for £100 on account, and done further work, estimated at £150, for which a final certificate was expected. Taylor was unable to pay either of these sums and he suggested to Norvell that Norvell should purchase three of the houses in order that the whole of the amount due on the joinery contract might be paid, and on June 18th, 1908, he agreed to sell the three houses to Norvell for £650. Later it was found that these three houses and a fourth were mortgaged together for £150 each, and it was then arranged that Norvell should purchase the fourth house, and on July 2nd, Taylor agreed to sell it to Norvell for £230.

On July 3rd, Norvell received from the architect a final certificate for £157 12s. 4d. On July 11th Norvell learnt for the first time that on June 30th, Taylor had committed an act of bankruptcy. On October 12th, a receiving order was made against Taylor and adjudication followed.

Norvell applied to the Court for an order against the trustee in bankruptcy for specific performance of the two contracts of June 18th and July 2nd, and for a declaration that he was entitled to set off the £257 12s. 4d. owing to himself, against the balance of the purchase money for the houses, after deducting the amount due on the mortgage, which he had paid off.

Decision

The **Court of Appeal** (FLETCHER MOULTON, L.J., dissenting) held that Norvell was entitled to the set-off claimed by him.

In his judgment, BUCKLEY, L.J., said :—

“ Under these circumstances it is plain that section 38 of the Bankruptcy Act, 1883, had effect. That is a section under which if there are mutual dealings a set-off is to take place by virtue of the statute, whether the result of the set-off be to the benefit or to the detriment of the estate of the bankrupt. The sum due from the one party is to be set off against the sum due from the other party, and the balance and no more is to be claimed (that is, against the bankrupt estate) or paid (that is, by the other party) as the case may be. Upon the execution of the agreements of June 18th and July 2nd, the houses became in equity the property of Norvell, and the purchase-money became a debt payable at a subsequent date by Norvell to Taylor. . . . Under section 37 all liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order are debts provable in bankruptcy. All such debts and liabilities resulting from mutual dealings are within section 38. The latter is a section directing a statutory set-off for the purpose of ascertaining the amount which can be proved. The subsequent facts are that the title was accepted, possession was taken, and the debts in respect of the purchase-moneys under the agreements of June 18th and July 2nd became payable. They were debts in respect of a contract existing at the date of the receiving order, and by virtue of section 38 there is necessarily a statutory set-off.”

NOTES

The above section 38 is now replaced by section 31 of the Bankruptcy Act, 1914. See also *Re City Life Assurance Co. Ltd.*, [1926] Ch. 191.

To set-off debts these must be due between the same parties and in the same right. *Re Pennington and Owen, Ltd.*, [1925] Ch. 825, decided that a partnership debt to a company in liquidation could not be set-off against a debt owing by the company to one of the partners. See Stevens' Elements of Mercantile Law, 10th Edn., p. 644.

ARBITRATION

SCOTT v. Avery

(1855), 5 H. L. Cas. 811

The parties to a contract cannot oust the jurisdiction of the Courts, merely by agreeing to refer disputes to arbitration, but where they agree that the obtaining of an award shall be a condition precedent to liability, then an action cannot be maintained in the Courts until such award has been obtained.

Facts of the Case

The plaintiff took out three policies of insurance on the ship *Alexander* in three assurance companies, of which he and the defendant were members and the following facts refer to the first of those policies.

There was an agreement between the members of the particular association or company that the rules and regulations of the association should be binding on both the assurers and the assured as if they were inserted in any policy. One of the rules provided that the sum to be paid by the association to a member for any loss or damage should in the first instance be ascertained and settled by the committee, and if the member agreed to accept that sum in full satisfaction he should be entitled to demand the same when so settled, but that if a difference arose between the committee and a member with regard to the settling of any loss or damage, etc., it should be referred to arbitration, and that no member who refused to accept the amount of any loss as settled by the committee, should be entitled to maintain an action on his policy until the matters in dispute had been referred to and decided by arbitrators, and then only for such sum as the arbitrators should award. And the concluding words of this rule were :—

“ And the obtaining the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit.”

The plaintiff's ship was damaged, and the committee proceeded to ascertain and settle the sum to be paid to him, but a dispute arose, and the plaintiff declined to accept the sum so ascertained, and he brought this action for recovery of his loss. The associa-

tion contended that they had been willing to refer the matter to arbitration in accordance with the rules, but that the plaintiff refused to do that, and they now contended (through the defendant) that the action could not be maintained by the plaintiff because he had so refused, and had not obtained an award which was a condition precedent to the liability of the association.

Decision

In the **House of Lords** judgment was given for the defendant.

Lord CRANWORTH, L.C., said :—

“ There is no doubt of the general principle which was argued at your lordships’ bar, that parties cannot by contract oust the ordinary Courts of their jurisdiction. That has been decided in many cases. . . . There is no doubt that where a right of action has accrued, parties cannot by contract say that there shall not be jurisdiction to enforce damages in respect of that right of action. . . . But surely there can be no principle or policy of law which prevents parties from entering into such a contract as that no breach shall occur until after a reference has been made to arbitration. . . . If I covenant with A. B. that if I do or omit to do a certain act, then I will pay to him such a sum as J. S. shall award as the amount of damage sustained by him, then, until J. S. has made his award, and I have omitted to pay the sum awarded, my covenant has not been broken, and no right of action has arisen. The policy of the law does not prevent parties from so contracting. And the question is here, what is the contract? Does any right of action exist until the amount of damage has been ascertained in the specified mode? I think clearly not. The stipulation here is, that the sum to be paid to the suffering member shall be settled by the committee. Certain proceedings are provided to obtain the decision of arbitrators, and there is this express stipulation, that ‘ the obtaining the decision of such arbitrators on the matters and claims in dispute, is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit.’ . . . It appears to me perfectly clear, that until the award was made no right of action accrued.”

NOTES

See also the case of *Caledonian Insurance Co. v. Gilmour*, [1893] A. C. 85. As to the effect of s. 3 (4) Arbitration Act, 1934, see Stevens’ Elements of Mercantile Law, 10th Edn., pp. 659, 660.

The establishment of arbitration tribunals raises an important problem of public policy. In how far should the Courts allow parties to submit their disputes to such “ private tribunals ” and in how far is it necessary to assert the authority of the Courts? With regard to certain kinds of tribunals and certain points to be decided by them

the position has been explained by MAUGHAM, J., in *McLean v. Worker's Union*, see *supra*, p. 54.

With regard to arbitrations proper the following points should be kept in mind. In *Czarnikow v. Roth, Schmidt & Co.*, [1922] 2 K. B. 478, ATKIN, L.J., laid down, at p. 491 :—

"In the case of powerful associations such as the present, able to impose their own arbitration clauses upon their members, and, by their uniform contract, conditions upon all non-members contracting with members, the result might be that in time codes of law would come to be administered in various trades differing substantially from the English mercantile law. The policy of the law has given to the High Court large powers over inferior Courts for the very purpose of maintaining a uniform standard of justice and one uniform system of law."

In the same case SCRUTTON, L.J., referred to the fact that arbitrators were often laymen who were bound occasionally to apply the law wrongly. Therefore (p. 488) :—

"Parliament has provided in the Arbitration Act (that) not only may they (namely the arbitrators) ask the Courts for guidance and the solution of their legal problems in special cases stated at their own instance, but that the Courts may require them, even if unwilling, to state cases for the opinion of the Court on the application of a party to the arbitration if the Courts think it proper. This is done in order that the Courts may ensure the proper administration of the law by inferior tribunals. In my view to allow English citizens to agree to exclude this safeguard for the administration of the law is contrary to public policy. There must be no Alsacia in England where the King's writ does not run."

On p. 489 the learned Lord Justice explained the effect of *Scott v. Avery, supra*, in this way :—

"I have always understood it to be a decision that while parties cannot agree to oust the jurisdiction of the Kings' Courts, they can agree that no action shall be brought in those Courts till the amount of liability has been settled by arbitration."

In the case where these words were spoken sugar was sold subject to the rules of the Refined Sugar Association, and the rules provided for submission of all disputes to arbitration. The rules further provided that the parties to an arbitration should neither require an arbitrator to state a case for the opinion of the Court, nor should they themselves make such an application. Applying the principles laid down above the Court of Appeal decided that such clause purported to oust the jurisdiction of the Courts and was therefore invalid as contrary to public policy.

On the other hand, in *Atlantic Shipping Co., Ltd. v. Louis Dreyfus & Co.*, [1922] 2 A. C. 250, the House of Lords had to deal with the follow-

ing facts. A ship was chartered to carry a cargo of linseed from Rosario to Hull. Disputes were to be referred to arbitration by two arbitrators to be appointed by each party. If claimants failed to appoint an arbitrator within three months of the final discharge of the cargo the claim should be deemed to have been waived. The cargo arrived in a damaged condition, and the charterers claimed compensation alleging that the damage had been caused by the shipowners committing a breach of the implied warranty of seaworthiness. They failed however to appoint an arbitrator within the prescribed period of three months, but sued the shipowners in the Court. It was held that an arbitration clause of this kind could not be said to oust the jurisdiction of the Court, and was valid; in the particular circumstances of this case the arbitration clause was held not to apply, because there was no warranty of seaworthiness in the charterparty contract itself and the arbitration clause related only to disputes "under the contract." The dispute as to seaworthiness did not arise "under the contract" and was therefore quite properly made the subject of an action at law.

A similar clause was judicially construed in *Pinnock Bros. v. Lewis & Peat, Ltd.*, [1923] 1 K. B. 690. There copra was sold, the re-sale of which was in the contemplation of the parties. The arbitration clause limited the time within which a claim could be preferred to fourteen days after the discharge of the cargo, but owing to the fact that the copra went through several hands before it reached the consumer who discovered the defective quality the first buyer claimed long after the fourteen days' period had expired. The arbitrator thereupon refused to go into the merits of the claim and dismissed it. When the buyer sued the seller in Court his action was successful. ROCHE, J., said, at p. 696:—

"The presence of an arbitration clause in a contract is not in itself a bar to an action or a condition precedent to a right of action. It may be a ground for applying for a stay, but it is not even a ground upon which the Court is bound to grant a stay. . . . An award following on the arbitration clause may be an answer to the claim, and it will be an answer where it deals with the claim. . . . But where, as in this case, the award does not deal with the claims, but merely with the jurisdiction of the arbitrator, it is no answer."

By s. 16 (6) of the Arbitration Act, 1934, the Court may now in every case, where it thinks hardship would be inflicted on a claimant if time limits contained in arbitration agreements were strictly enforced, disregard such clauses, and entertain claims, provided they are not barred under any of the Statutes of Limitation. As to these see *supra*, pp. 81, 82.

A similar problem arises when the parties to a contract made in England agree that disputes must be decided in a foreign Court. In *Kidston v. Deutsche Lufthansa A.G.* (1930), 38 Ll. L. Rep. 1, where the plaintiff had bought a ticket for an air journey from Croydon to the Continent in a German airplane, and where there was a condition to

that effect on the ticket, the Court of Appeal refused to give effect to such condition. SCRUTON, L.J., said, at p. 2 :—

“ The King’s Courts do not allow their jurisdiction over matters happening in England, in regard to contracts made in England, to be ousted by the agreement of the parties ; they do not allow parties in England making a contract to say that English Courts shall not deal with questions arising out of it ; they reserve a discretion to consider the whole matter, considering the importance of the people keeping their contracts, considering the importance of the Kings’ Courts having jurisdiction over matters happening in England, and considering the nature of the questions to be tried, the evidence that will have to be given and all relevant matters, to say as a matter of discretion whether they will or will not stay the action.”

In that case, as the accident which gave rise to the action also happened in England and most of the evidence could most easily be produced here, the Court entertained the action. Where, however, in similar circumstances most of the witnesses were abroad, and it was more convenient for the case to be tried abroad, the Court gave effect to the clause, and refused to try the action here : *The Cap Blanco*, [1913] P. 130, 135.

Reference should also be made to the two cases immediately following this one.

(1) JUREIDINI v. NATIONAL BRITISH AND IRISH MILLERS INSURANCE CO., LTD.,

[1915] A. C. 499

(2) WOODALL v. PEARL ASSURANCE CO., LTD.,

[1919] 1 K. B. 593

Where a contract containing an arbitration clause is repudiated by one party, he cannot insist on matters in dispute being referred to arbitration. But where he simply denies his liability, without repudiating the contract itself, then he does not lose the right to have the matters in dispute referred to arbitration.

Facts of the First Case

Jureidini and one Mahli (since deceased) carried on business as hardware merchants at Port Limon in the Republic of Costa Rica, and they had insured their stock in trade against loss by fire with the defendants and other companies. One of the conditions of the policy issued by the defendants provided (*inter alia*) that if any claim was fraudulent, or if any false declaration was made in support thereof, or if any fraudulent means or devices were used

by the insured or anyone acting on his behalf to obtain any benefit under the policy, or if the loss or damage was occasioned by the wilful act, or with the connivance, of the insured, all benefit under the policy should be forfeited. Another condition provided that if any difference arose as to the amount of any loss or damage it should be referred to arbitration in the manner provided and the concluding words of this condition were : " and it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators, or umpire of the amount of the loss of damage if disputed shall be first obtained."

The premises of the firm at Port Limon, and the goods therein, were destroyed by fire and notice of the loss was given to the defendants and other companies. After a long correspondence with a view to settling the claim, the agent of the firm in Manchester wrote to the defendants, who were acting on behalf of all the insurance companies concerned, fixing the claim at £6,250. The defendants' solicitors replied, pointing out to the agent that his correspondents in Costa Rica were tried for arson in respect of the fire, and that although the judge held the charge was not proved, they (the solicitors) had been compelled to advise the defendants that they ought not to admit the claim, and later the solicitors stated that their letter was to be taken as a total rejection of the claim.

The firm then brought actions against the several companies, and the parties agreed to be bound by the result of this action against the defendants. By their defence the defendants pleaded that the plaintiffs' claim was fraudulent and excessive, and that the plaintiffs set fire to the premises or connived at that being done, and also that the arbitration clause had not been complied with and that it was a condition precedent to any right of action on the policy that an award should be obtained.

At the trial, the jury found that the plaintiffs did not set fire to the premises, or connive at their being set on fire, nor make a fraudulent claim within the above condition, and they assessed the value of the goods at £3,000.

Decision in the First Case

The **House of Lords** held that the defendants had repudiated the policy altogether, and therefore could not rely on the condition in the policy as to arbitration, and they gave judgment in favour of the plaintiffs.

Viscount HALDANE, L.C., after referring to *Scott v. Avery* (1855), 5 H. L. Cas. 811, said :—

" But the present case, as I have already pointed out, is different. There has been in the proceedings throughout a repudiation on the part of the respondents" (that is the defendants) " of their liability, based upon charges of fraud and arson, the effect of which, if they are right, is that all benefit under the policy is forfeited. But one of the benefits is the right to go to arbitration under this contract, and to establish your claim in a way which may, to some people, seem preferable to proceedings in the Courts; and accordingly that is one of the things which the appellants have according to the respondents, forfeited with every other benefit under the contract.

" Now, my Lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract, I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced."

Facts of the Second Case

In June, 1911, William Woodall filled in a proposal form for insurance against accident, with the defendant company, in which, in answer to the question what was his profession, occupation, business, or trade, he stated " haulier and contractor "; and in answer to a further question as to whether he was a working master or workman, he stated " master working." The form contained the usual declaration by the proposer that the answers given to the questions were true, and that he was in good health, and agreeing that this declaration should be the basis of the contract.

The policy when issued referred to the proposal and declaration so signed as being the basis of the contract, and also made it a condition precedent to the recovery of any sum that the conditions endorsed thereon should be strictly observed. One condition provided that the policy might be renewed from year to year, but that if the risk was increased, *e.g.* by the assured engaging in some other occupation, then, unless notice in writing was given to the company and an extra premium paid if required, the policy should be void, and another condition provided that all questions arising as to the liability of the company should be referred to arbitration and that no action should be maintained except for the sum awarded under such arbitration.

Woodall was in partnership with his father, and they owned a barge, three carts, and four horses, and did haulage by road and water. On February 7th, 1918, while the policy was still in force, Woodall was working the barge with another man on the canal, when he accidentally fell into the canal and was drowned. At the inquest he was described as a " boatman." The plaintiff, his widow, claimed £625 under the policy.

At an interview on April 3rd, 1918, between the solicitors representing the parties, the defendants' solicitor stated that if the deceased was a boatman at the date of the policy, the statement he made that he was a haulier and contractor was a misstatement of fact and the policy was void, and that if he had changed his occupation he should have given notice to the company as required by the conditions, and the policy was void on that ground, and he said the company required the matter to go to arbitration, under the conditions of the policy. The plaintiff, however, brought this action, and the defendants pleaded (*inter alia*) that the obtaining of an award by arbitration was a condition precedent to any right of action. The plaintiff replied that the defendants had repudiated the contract contained in the policy and therefore could not rely on the condition as to arbitration.

Decision in the Second Case

The **Court of Appeal** held that the defendants had not repudiated the policy and were entitled to rely on the condition as to arbitration, and they entered judgment for the defendants.

In the course of his judgment, BANKES, L.J., said:—

"The next question is whether the case is governed by *Jureidini's* case (see above). I am not able to agree with the learned judge on this point. In considering this part of the case, it is necessary to draw a clear and sharp distinction between two separate classes of cases. One class is where the insurance company is repudiating a contract in the sense that they are disputing the existence of a binding contract at all. *Jureidini's* case falls within that class. The other is where the company is repudiating liability under the contract, but is accepting the existence of the contract as a binding contract. *Stebbing v. Liverpool and London and Globe Insurance Co.*, [1917] 2 K. B. 433, is an instance of the latter class. Within which class does the present case come? . . . The conclusion at which I arrive is that the company never repudiated the contract in the sense I have mentioned, and that their position throughout was that they alleged that the assured had misdescribed his occupation, or had changed his occupation, and insisted upon arbitration to have that dispute adjudicated upon. . . . In my opinion therefore the company, having regard to the attitude which they took up and to the terms of the policy, are right in saying that the case falls within the principle of the decision in *Scott v. Avery* (see above), and the plaintiff has no right of action unless and until an award in the arbitration has been made, and the amount due to her has been ascertained."

NOTES

Likewise an arbitrator appointed under a contract has no jurisdiction if the contract is discharged by impossibility of performance, see *Hirji Mulju v. Cheong Yue S.S. Co.*, [1926] A. C. 497. As to impossibility generally, see *supra*, pp. 83 *et seq.*

Re ENOCH and ZARETZKY, BOCK & CO.'S ARBITRATION,

[1910] 1 K. B. 327

- (a) *Neither a judge nor an umpire has any right to call a witness in a civil action without the consent of the parties;*
- (b) *An arbitrator must observe the rules of evidence.*

Facts of the Case

A contract between Messrs. Enoch and Messrs. Zaretzky, Bock & Co., Ltd., relating to the purchase of Rangoon rice bran, contained an arbitration clause. Disputes arose and the parties appointed arbitrators, who appointed an umpire, and the arbitration was held.

The sellers (Z. B. & Co., Ltd.) complained that the proceedings under the arbitration were not conducted fairly and impartially by the umpire. In particular they alleged (*inter alia*) that he did not give proper consideration to their case; that he insisted on the attendance of Mr. Zaretzky to give evidence; that he would not give them an adjournment to get evidence from Rangoon; that without their consent and without informing them of the nature of the evidence to be given, he himself called a witness to whose evidence he attached great weight; and that he refused to admit some of their evidence, and without hearing it or waiting for their further evidence from Rangoon, he decided that the bran was not in proper condition. When requested by the sellers to state certain questions of law for the opinion of the court, the umpire wrote that he was willing to do that, but must ask them first to hand him a cheque on account of legal expenses. The sellers applied by motion for an order that the umpire should be removed and the matters in dispute remitted to the arbitrators to be heard by them and a new umpire, or that leave should be given to revoke altogether the submission to arbitration.

Decision

The Court of Appeal directed that the umpire should be removed, and the matters in dispute remitted to the arbitrators

for the appointment of a new umpire. In his judgment, FLETCHER MOULTON, L.J., said :—

“ The point to which I wish to allude is the question of the umpire himself procuring evidence in the arbitration. It is quite clear, both from his conduct and from the line that has been taken by counsel for the respondents on this appeal, that there is an idea that an umpire, a person in a judicial position, has the power, and, I suppose, the duty, to call witnesses in a civil dispute, whom the parties do not either of them choose to call. In my opinion there is no such power. A judge has nothing to do with the getting up of a case.”

After referring to a dictum of Lord ESHER, M.R., in the case of *Coulson v. Disborough*, [1894] 2 Q. B. 316, where Lord ESHER said that a judge was himself entitled to call a witness, FLETCHER MOULTON, L.J., continued :—

“ If that means to call him when either side objects, I am satisfied that there is no basis for that dictum; but it must be remembered that there is no suggestion in the report or the judgments that the witness was called by the judge against the will of either of the parties . . . but the dictum does not lay down, and in my opinion it is certainly not the law, that a judge, or any person in a judicial position such as an arbitrator, has any power himself to call witnesses to fact against the will of either of the parties.”

And FARWELL, L.J., said :—

“ It is plain that the Courts do allow considerable latitude, in practice at any rate, to the reception of evidence by umpires, but to say as a general proposition that they are not bound by the rules of evidence appears to me to be entirely misleading and likely to produce very great injustice.”

NOTES

In *Ramsden & Co., Ltd. v. Jacobs*, [1922] 1 K. B. 640, in an arbitration between sellers and buyers arising out of the rejection of goods sold, the arbitrators heard the evidence of each of the parties in the absence of the other. No objection was made to this procedure at the time, but the buyers now moved the Court to set aside the award made in favour of the sellers, and the Divisional Court did so, on the ground that the procedure of the arbitrators was wrong in hearing the evidence of one party in the absence of the other.

In the case of commercial arbitrations, great latitude is allowed to arbitrators. Perhaps the most important departure from ordinary practice is that where in a dispute each party appoints an arbitrator, and the two arbitrators appoint an umpire, the latter may, if the parties

consent, hear the two arbitrators as advocates of the party appointing them. This course was sanctioned in *French Government v. Owners of ss. Tsurushima Maru* (1921), 37 T. L. R. 961, and this decision represents a true statement of the law, though the practice was criticised in an *obiter dictum* by SWINFEN EADY, M.R., in *Roff v. British and French Chemical Manufacturing Co.*, [1918] 2 K. B. 677, 680. It is of course necessary for the parties to agree to this procedure, but where it is usual in the trade an arbitration clause providing for arbitration "in the usual way" constitutes a sufficient assent. This was decided by a divisional court in *Naumann v. Edward Nathan & Co., Ltd.* (1930), 36 Ll. L. Rep. 268.

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